

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1743

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1743

MJB SALES ASSOCIATES

Plaintiff-Appellee,

— against —

DANA HALL OF CALIFORNIA, INC.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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JUDGE CONNER ~~JUDGE TATUM~~

72 CIV. 2850

D. C. Form No. 196 Rev.

TITLE OF CASE

ATTORNEYS

For plaintiff:

VS

STRASSBERG & STRASSBERG

225 West 34th St. 10001 565-5

DANA HALL OF CALIFORNIA, INC.

For defendant:

Aren, Weisman & Butler

17 East 63rd St., NY 10021 TE 8-2323

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk	7/5/72	Shawcross	15	
		7/7/72	K. S. V. M. Co.		15
		7/13/72	Conner	5	
J.S. 6 mailed ✓	Marshal	7/14/72	Therrell		5
Basis of Action:	Docket fee				
Breach of Contract	Witness fees				
\$11,680.10					
Action arose at:	Depositions				

72 Civ 2850 M J B SALES ASSOC. VS DANA HALL OF CALIF., INC.

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JUDGE CONNER

72 CIV. 285

DATE	PROCEEDINGS	Judgment
Jul.5-72	Filed complaint and issued summons	
Jul.24-72	Filed summons with marshal's ret. Served.	
	Dana Hall Of California, Inc. by Michael Savitsky, on 7-12-72	
Aug.8-72	Filed stipulation and order extending defendant's time to answer complaint to 8/30/72. So ordered. Tenney, J.	
sep.8-72	Filed ANSWER to complaint.	KRC
Nov.1-72	Filed REPLY to the answer and counterclaim of deft.	S&S
Nov.1-72	Filed plttf's Notice to take deposition of Michael Savitsky, on 10-27-72.	
Nov.1-72	Filed plttf's Request For Production of Documents.	
Nov.6-72	Filed Notice of Motion before Tenney, J. Ret. 11/10/72 at 10 AM re: Default Judgt.	
Nov.6-72	Filed Memorandum of Law in support of plttf's motion.	
Nov.9-72	Filed Robert L. Ellis, Affidavit in Opposition to plttf's motion	
Nov.15-72	Filed Louis Strassberg, reply affidavit to the answering affidavit of Robert L. Ellis, etc.	
Nov.22-72	Filed plttf's affdvt. and notice of motion .Re; Judgment by Default Ret. 12-1-72, or date set by court.	
Nov29-72	Filed Memo Endorsed on motion filed 11-6-72--The motion for judgment on default is granted without further order of this Court unless defendant shall comply with plttf's notice to take deposition of Michael Savitsky, president of defendant, dated Sept. 29, 1972 is complied with within 30 days of the entry of this order, etc. Tenney, J.	M/N
Dec.4-72	Filed Affidavit of Alan H. Gerson, for plttf. in support of motion	
Dec.4-72	Filed Memo endorsed on motion filed 11-22-72--Motion denied. So Ordered. Tenney, J.	
Feb 28.73	Filed Notice to take deposition by dft.	
Apr.25.73	Filed notice to take deposition of Jacqueline Wilson.	
May 17.73	Filed plttf. request to produce, and copy documents.	
Apr. 22-74	Before CONNER, J. jury trial begun.	
Apr. 23-74	trial continued	
Apr. 24-74	trial continued	
April 25-74	trial continued and concluded. (total 4-days). Decision reserved.	
May 3-74	Filed Judgment, # 74,397: ORDERED that the plttf M J B SALES ASSOCIATES have judgment against deft. DANA HALL OF CALIFORNIA, INC. in the amount of \$23, 732.21, together with interest at the rate of 6% from June 1, 1972. Clerk.	
May 13-74	Filed deft's notice of appeal from final judgment entered 5-3-74. Copy mailed to Strassberg & Strassberg. Entered 5-14-74.	
* Nov. 28-72	Filed Affidavit of Robert L. Ellis, attorney for the deft. in opposition to plaintiff's motion pursuant to Rule 37(d) FRCP.	
JUN. 20-74	Filed defendant's trial memorandum.	
JUN. 20-74	Filed defendant's requests to charge.	
Jun 24-74	Filed letter from Amen, Weisman & Butler to Clerk, U.S.D.C, re: filing of exhibits (plaintiff's exs 21 and 23) at a later date.	
Jun 24-74	Filed stipulation designating exhibits to be transmitted to the U.S.C.A.	

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RAYMOND F. BURG

By

Deputy Clerk

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It couldn't ship all the orders that were booked, as we will show you also, all orders that were received, and that's what was meant by booking orders, receiving an order and forwarding it to California, that's an order booked, all orders that were received were then passed on to their factor for credit approval, because as in most businesses of this type of this size, goods are manufactured only through dollars produced by factors and other financing agencies who advance money on the strength and ultimate credit worthiness of the ultimate customer; and any order that was received had to be approved by the factor before it was processed.

And we will show you that throughout the whole relationship, orders were passed on to the factors and were disapproved and they were never shipped. Yes, a million and a half dollars of orders were booked but that means nothing. We will show you from commission statements originating in May, 1971, and continuing through April, 1972, that the money, the only money that the plaintiff ever got paid from the defendant was a commission based on orders actually shipped in that month.

And so if that is the fact, that more orders were booked, it is totally immaterial and of no consequence.

We will also show you from a principal of the

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1 sales of approximately \$70,000 with commissions due of
2 approximately \$3,000, which were paid.

3
4 We will further admit and we did admit, we
5 told Mr. Strassberg in the court this morning, that when
6 Mr. Savitsky was prepared to come to New York last Thurs-
7 day night, he went through dead files, and he found another
8 commission statement, not in his writing, in the handwriting
9 of this former bookkeeper who will be a witness, indicating
10 that sales for the month were not \$70,000 but \$200,000.
11 We will show you, we concede that the plaintiff was en-
12 titled to additional commissions for the month of May,
13 1972, in the sum of \$6,040 and we concede it, so there is
14 no argument there.

15 We will show you also though, through the testi-
16 mony of plaintiff's former principal, the man who left
17 the plaintiff to go to work for the defendant, that in
18 May, 1972, orders were booked by this gentleman working
19 directly for the defendant which were shipped in June and
20 July, and I say to you ladies and gentlemen of the jury,
21 hold Mr. Strassberg to his word, put him to his proof.

22 It is not sufficient that an order was shipped
23 in June or July or May, for that matter, of 1972, to
24 entitle the plaintiffs to a commission on that order.
25 From the day following their termination of employment by

Q And if you sold goods in February, when would that be delivered?

A March, if it's summer again March into April but you might try to get an extension of say, instead of April 10th you might say April 25th, to that effect.

Q After that conversation in April of 1971, did M.J.B. start to sell goods on behalf of Dana Hall?

A Yes, sir.

Q What kind of records did you keep of the goods you sold?

A We had -- well, we have an order, when we received an order from a customer, we would have a three by five index card, and on the card would be the name of the account, the address and the city and state. Then we would put down the date, the styles that they would buy and amount of styles, per style, you know, that they bought.

Then this was kept in a little file so we have our account file.

Then on top of that we kept a daily booking sheet to figure out how much we did.

Now, whoever was on the road would send a copy of their orders to New York also to be put on that index card in order to have a record of the accounts that we sold.

2 Q From May of 1971 through December of 1971 at
3 the end of each month, or sometime during the course of
4 the following month, you would receive a statement with
5 respect to what had been shipped and commissions due to
6 you, is that correct?

7 A Right. We would get that on the 10th of the
8 following month, if the month ended April that means May
9 10th we would get a statement.

10 Q And although your agreement was for you to
11 get a commission on seventy-five percent of the orders,
12 the commission statements showed what was shipped, is
13 that correct?

14 A Right, sir.

15 Q And from May through December of '71, you
16 received all monies that were due to you, is that correct?

17 A Yes, right, sir.

18 MR. STRASSBERG: At this time could you mark
19 these documents which are entitled Commission Statements
20 for the months of May through December of 1971 with
21 various documents as a plaintiff's exhibit.

22 (Plaintiff's Exhibit 4 marked for identification.)

23 Q And, sir, are those the various Commission
24 Statements and the back-up information that you received
25 during that period?

2 A Yes, sir.

3 Q And you were paid during that period?

4 A Right, sir.

5 Q What was due you, is that correct?

6 A Right, sir.

7 MR. STRASSBERG: I offer these documents in.

8 MR. TESSLER: I object, your Honor, since the
9 witness testifies that he was paid all that was due for
10 that period, I don't see what they are doing in this case.

11 THE COURT: What is the purpose of it, Mr.
12 Strassberg?

13 MR. STRASSBERG: Just for continuity, your
14 Honor. I will withdraw the offer.

15 THE COURT: All right.

16 Q Now you told us about some records that you
17 kept, and since -- sir, in December of 1971 you had a
18 conversation with Mr. Savitsky, is that correct?

19 A Yes, sir.

20 Q Where did that conversation take place?

21 A We -- Mr. Savitsky had come into New York to
22 sign a lease for a new showroom at 1400 Broadway, and then
23 when he came back to our 1375 Broadway showroom, we had
24 a conversation there.

25 Q And was there a discussion with reference to a

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new commission arrangement at that time?

A Yes, sir, because of the fact that Mr. Savitsky was going to pay the rent and pay the telephone, M.J.B. offered to pay -- to take back one percent, to give him one percent of our original eight percent commission down to seven to offset the expenses of the showroom and the telephone.

Q And did you also agree to reduce the other commission to three and a half percent?

A Yes, sir.

Q I show you these pages marked -- this batch of clipped-together pages. Could you mark that?

(Plaintiff's Exhibit 5 marked for identification.)

Q I show you Plaintiff's Exhibit 5 for identification, and I ask you if you can tell us what these are, sir.

A Those are the booking records that we kept to see what we had done every day and into the week and so on, and then by the month.

Q Were they made in the regular course of business?

A Yes, daily.

Q And those were the records kept by M.J.B. of the sales and bookings that it had in addition to these little cards?

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A . Right, right, sir.

Q Do you have those little cards, by the way?

A No, sir.

MR. STRASSBERG: I offer these sheets,
Plaintiff's Exhibit 5 for identification, in evidence.

MR. TESSLER: Your Honor, I am going to object
to this on many grounds. Number one, there has been no
foundation as to the manner in which they were made, as
to the person who made them, as to their custody, et cetera.

Number two, since the witness is testifying
that he was paid commissions in 1971 --

MR. STRASSBERG: These are commencing '72.

MR. TESSLER: Just a minute, Mr. Strassberg --
that he was paid commissions in 1971 on the amount of
orders shipped, and these statements start in 1972, un-
less there was a different arrangement in 1972, I don't
see what relevance the amount of orders booked has to
this case.

MR. STRASSBERG: Your Honor, the testimony
by the plaintiff at this point solely is that these were
records kept in the regular course of business. I am
going to ask him. He has identified these as records kept
by the corporation in its regular course of business of
orders booked. I am going to ask him about the arrangement

of December '71 with reference to this matter.

THE COURT: Well, one of the grounds of objection is that there has been no testimony yet as to by whom these records were kept and their custody and so forth. I think you might examine further on that before I rule on the objection.

MR. STRASSBERG: All right.

Q Who were these records, Plaintiff's Exhibit 5 for identification, kept by, sir?

A Myself, Mel Kleeman or Jerry Katz.

Q Were they kept in the office of the plaintiff corporation at all times?

A Yes, sir.

Q Do you recognize the handwritings on these pages?

A Yes, sir.

Q Were they the handwritings of the persons you identified?

A Definitely. Definitely.

Q Were they all officers of the corporation at this time?

A Yes, sir.

MR. STRASSBERG: I renew my offer, your Honor.

THE COURT: Where did the people that made the

entries on these sheets get the information?

A We would have again let's say we received orders for that particular day and we would total them up and on here it would have the date, now it was usually where Mel -- Mr. Kleeman and myself would be on the road or in 1375 showroom and we would have the figures and then the 1400 Broadway showroom figures, and we would just keep adding them up for that particular day and then at the end of the week we added those up, sir.

So the figures would come off the orders dollar-wise.

THE COURT: Did you keep copies of the orders themselves?

THE WITNESS: No, sir, we kept the account file cards because this was our dollar record and that was the account cards that gives us the styles and when they bought it and when it was shipped and so on.

THE COURT: Where were these records kept?

THE WITNESS: These were kept in our office in 1375 Broadway.

THE COURT: Right up to the present?

THE WITNESS: Right up to the time, right, sir.

THE COURT: All right, they may be received.

MR. TESSLER: Your Honor, I don't know if the

1 Court ruled on the second ground of my objection. The
2 witness is testifying that he received commissions in
3 1971, and he got all the money that was due him in 1971,
4 and that those commissions were paid on the basis of
5 orders shipped.
6

7 Unless the witness --

8 MR. STRASSBERG: The witness testified that
9 those commissions were on the basis of what he booked.

10 THE COURT: Let him finish the objection first.

11 MR. TESSLER: I submit, your Honor, that un-
12 less the witness testifies that in 1972 a different
13 arrangement was entered into, and commissions were
14 payable on a basis other than on the basis of orders
15 shipped, then these records are totally irrelevant to
16 this case.

17 THE COURT: My understanding, and correct me
18 if I am wrong, Mr. Strassberg, is that the arrangement
19 was that he was to be paid on the basis of orders shipped
20 unless seventy-five percent of the orders booked was
21 greater, in which case he would get the greater amount.
22 Isn't that correct?

23 MR. TESSLER: That wasn't my understanding.

24 MR. STRASSBERG: That was the original under-
25 standing, your Honor, and I will clarify that by asking

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him about the understanding of December of 1971.

Q Sir, in December of 1971 did you have any discussion with Mr. Savitsky?

A Yes, sir.

Q Where did it take place?

A At 1375 Broadway.

Q Was there a discussion with reference to what your commission arrangement would be?

A Yes.

Q Could you tell us what he said and what you said?

A We were getting paid not on shipping but on orders booked, credit-approved orders booked, not shipping.

Now he said, "You guys are really doing a lot of business. I can't afford to continue this way, so from here on in I am going to have to give you a draw against orders shipped," but up to December 31, 1971, we were getting paid on orders booked, credit-approved orders booked only, no shipping on that at all, sir.

Q Thereafter it was to be on orders shipped?

A Right, sir.

Q Was there any discussion with reference to the percentage of orders to be shipped by him?

A Yes, he said that things have really been pro-

2 grassing and he is now in good shape, he's got new
3 machines going in, and so on, he will be able to ship
4 eighty percent.

5 Q He said to you that he would ship eighty per-
6 cent of all orders that you booked?

7 A Credit-approved, right, sir.

8 Q And those exhibits, those documents, Plaintiff's
9 Exhibit 5, those are records of orders that you booked
10 for what period?

11 A January, '72, up to the last week in April,
12 72, but that does not include the orders for the --

13 MR. TESSLER: I object, your Honor, everything
14 after April of 1972. I think the question was what do
15 those sheets include, not what they don't include.

16 THE COURT: Yes, that's right. What do the
17 sheets include?

18 THE WITNESS: January, '72, to April, '72,
19 bookings.

20 Q Does it include the entire month of April of
21 1972?

22 A No, sir.

23 Q What portion of the month is missing?

24 A The last week of the month.

25 Q Can you explain why the records for the last

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2 week of April aren't there?

3 A Our former partner had decided to go to work

4 exclusively for Mr. Savitsky, and he would not give us

5 the figures.

6 Q When you say your former partner, whom do you

7 mean?

8 A Mr. Katz.

9 Q Mr. Jerry Katz?

10 A Yes, sir.

11 Q There came a time when he went to work for

12 Mr. Savitsky?

13 A Yes, sir.

14 Q In the New York showroom of Dana Hall?

15 A Yes, sir.

16 Q When was that?

17 A The first week in May, sir.

18 Q Were all those little account cards that you

19 told us about when you took an order that you stapled the

20 order to, where were those account cards kept?

21 A There is a misunderstanding. We didn't staple

22 the order to it. We wrote -- on the three by five card

23 was the name, the address again and city and state plus

24 the date of the order and the completion date of that order

25 plus the styles that were listed and how many per style.

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2 got up and conceded that in his opening statement.

3 I respectfully submit the question of how
4 much was booked now becomes very relevant.5 THE COURT: Well, let me ask you this: is there
6 any way to find out what was actually shipped on the orders
7 that were booked in January?8 MR. STRASSBERG: The only way to find out is
9 to have the order cards which were in the defendant's
10 possession and no longer exist.11 MR. TESSLER: Your Honor, I think you just asked
12 is there any way to find out what was actually shipped
13 in January of 1972.14 THE COURT: No, shipped on the orders that were
15 booked January to April.16 MR. TESSLER: You mean what were the orders
17 booked and what were shipped?18 THE COURT: We know what the bookings were
19 apparently but your point is that that doesn't indicate
20 what the shipments were and I am asking whether there is
21 any way in the records available to find out what was
22 actually shipped.23 MR. TESSLER: Against orders booked, no, your
24 Honor, there is not.

25 THE COURT: Then I am going to permit this.

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It is the best available evidence. Admittedly this is not the evidence of what was actually shipped but it seems to be that it is the closest we can get to it.

MR. TESSLER: There is, your Honor, evidence as to what was actually shipped. There is no question about that.

THE COURT: I just got through asking, is there any way to find out what was actually shipped.

MR. TESSLER: Yes, we have all of the shipping invoices showing the orders shipped for each month, and that, your Honor, I submit is the best evidence.

THE COURT: How long will it take for that information to be dug out of those voluminous records?

MR. TESSLER: I have no idea, your Honor.

MR. STRASSBERG: Your Honor, all during the course of the trial these very records were examined and we were told they didn't have these records, and as your Honor well knows, I produced a statement from defendant's attorney signed --

MR. TESSLER: Your Honor, I object to that statement.

MR. STRASSBERG: I respectfully submit --

MR. TESSLER: Not proper in front of a jury.

MR. STRASSBERG: I respectfully submit, your

1 Honor, that inasmuch as I have a concession by counsel
2 in his opening statement to the jury that at least sixty
3 percent of the orders were shipped, that my client's
4 testimony with respect to the amount of orders taken
5 becomes highly relevant.
6

7 THE COURT: All right. I will permit it with
8 the instruction to the jury that the amount of orders
9 booked is not the basis for computing the commissions.
10 It is the amount of orders that are actually shipped on
11 those bookings. That is agreed. Now, in allowing the
12 evidence as to the bookings to be placed before you, I
13 am cautioning you not to base any computation of damages
14 on the basis of those bookings, but instead on the basis
15 of what you find the actual shipments to have been.
16

17 There will be testimony, apparently, that there
18 was in effect an admission that sixty percent of the book-
19 ings were actually shipped. Now, the defendant may be able
20 to show from the records that it has brought here, that
21 more or less than sixty percent were shipped. I don't
22 know.

23 MR. STRASSBERG: Your Honor, there's been testi-
24 mony by him that the defendant stated he was shipping --

25 What was the figure you said?

A Eighty percent, sir.

1 That the defendant's lawyer conceded sixty
2 percent.
3

4 MR. TESSLER: Your Honor, I object.

5 MR. STRASSBERG: The witness' testimony is
6 that eighty percent were being shipped.

7 MR. TESSLER: Your Honor, the defendant's
8 lawyer didn't concede that. Mr. Strassberg in his
9 opening, as I am sure your Honor remembers, said that
10 they booked a million and a half and they only shipped
11 sixty percent. I made or intended to make no concession
12 as to the amount of orders shipped against orders booked
13 because I maintained in front of the jury and maintain in
14 front of your Honor that the amount of orders booked is
15 absolutely immaterial.

16 THE COURT: Well, the amount of orders booked
17 is material as a starting point for computing the amount
18 shipped. If the only evidence that we have as to the
19 amount shipped is a percentage of the amount booked, then
20 the jury, of course, will base its computations on that.

21 If you have available documents which show
22 that less than sixty percent or more than sixty percent
23 of the orders booked were actually shipped, then you will
24 certainly have the opportunity to introduce that evidence
25 before the trial ends.

1 MR. TESSLER: Well what we have, your Honor,
2
3 Is documents showing the amount of orders shipped which
4 were generated from the plaintiff's efforts but not re-
5 lated to the orders booked because as I made the point,
6 your Honor, we just didn't feel that that was material
7 to anything; but yes, we have evidence showing the
8 amount of orders shipped for each of the months.

9 MR. STRASSBERG: The orders.

10 THE COURT: I am going to permit the evidence
11 that shows the bookings to go to the jury and you will
12 have your opportunity to show that the shipments are an
13 entirely different matter having no relation whatever to
14 the bookings.

15 MR. TESSLER: Thank you, your Honor.

16 Q Did you have a discussion with Mr. Savitsky in
17 December with reference to the percentage of orders being
18 shipped? Would you repeat that?

19 A Yes, sir. Mr. Savitsky said that things looked
20 good now as far as he has additional machinery and piece
21 goods rolling and so on and he can deliver eighty percent.

22 THE COURT: That was eighty percent of the
23 credit-approved bookings, was it not?

24 THE WITNESS: Right, sir.

25 Q Can you tell me, sir, what were the orders you

obtained in January of 1972 total?

MR. TESSLER: Same objection, your Honor.

THE COURT: Same ruling.

A \$407,616.

Q Primarily what season were those goods of?

A That would be the summer season and the carry over of spring.

THE COURT: That is in January, your bookings?

THE WITNESS: Right, sir. Again --

THE COURT: All right.

Q In February how much did you book?

A A little over \$393,000.

Q What season were the February orders for?

A Summer.

Q When were they to be shipped?

A Probably March, April, into the latter part of April complete.

Q And in March, what goods were you taking orders for?

A We were already into changing the colors of summer into fall and selling recorders on summer.

Q In March you were selling fall goods already?

A Yes, the dark colors.

Q What was the amount of the orders you took in

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2 you recheck that March figure, sir?

3 A Approximately 268,000. In March did you say,
4 sir?

5 Q Yes, in March.

6 A Approximately 268,000.

7 Q Now, sir, do you have a May statement there?
8 Sir, I show you this photostat copy of a statement for
9 May, 1972.

10 MR. STRASSBERG: Your Honor, let the Court
11 note that I have folded over some comments that were not
12 on the original.

13 Q I ask you did you ever receive -- that was an
14 exhibit that was marked in a deposition -- did you ever
15 receive the original of this May statement?

16 A No, sir.

17 Q This May statement was produced in your presence
18 at a deposition?

19 MR. STRASSBERG: Will you concede, counselor,
20 that this photostat copy of a May statement indicating
21 commissions earned was produced by you at a deposition by
22 Mr. Ellis of your office?

23 MR. TESSLER: Yes, the entire statement without
24 the part folded down, I will so concede.

xxx 25 (Plaintiff's Exhibit 10 marked for identification.)

1 Q But you never received this document marked
2 Plaintiff's Exhibit 10 for identification, an original
3 of it, is that correct?
4

5 A No, sir.

6 Q And all of these Commission Statements were
7 all marked M.J.B. Associates, is that correct?

8 A Right, sir.

9 Q Whenever you received any checks, were the
10 checks made out to M.J.B. Associates?

11 A Yes, sir.

12 Q The Commission Statement of May, 1972, that
13 is marked Plaintiff's Exhibit 10 for identification shows
14 how much in goods shipped?

15 A Approximately fifty-seven five, \$57,500.

16 Q \$57,500?

17 MR. TESSLER: That is not right. Clearly not
18 right.

19 Q Let me take a look at that.

20 A Oh, I am sorry.

21 Q The net sales shows how much on this May, '72,
22 statement approximately?

23 THE COURT: You mean sales or shipments?

24 MR. STRASSBERG: Shipments.

25 A Fifty-eight five, fifty-seven five.

1 Plaintiff's Exhibit 10 in evidence.

2 THE COURT: Any objection?

3 MR. TESSLER: May I see that second sheet?

4 (Pause)

5 MR. TESSLER: No objection.

6 (Plaintiff's Exhibit 10 in evidence.)

7 C This document, Plaintiff's Exhibit 10 received,
8 talked about a commission due you of three -- or due
9 M.J.B. Associates of three thousand odd dollars.

10 A Right, sir.

11 C Did M.J.B. Associates ever receive a check for
12 \$3,000?

13 A No, sir.

14 It was the end of April when Mr. Katz, who was
15 formerly a principal of M.J.B., went to work for Mr.
16 Savitsky, is that correct?

17 Officially his last day was the end of April
18 with M.J.B.

19 Q Did you, Mr. Orenstein, individually receive a
20 check for any part of that \$3,000?

21 A Yes, sir, I received a \$1,000 check.

22 Q Did you ever cash that check?

23 A No, sir.

24 Q Did anyone else receive a thousand dollar check
25

to your knowledge?

A Mr. Kleeman did, sir.

Q Did he cash that check?

A No, sir.

Q Mr. Katz who then went to work for Mr. Savitsky, also received a check for a thousand dollars, is that correct?

A Right, sir.

Q That May statement was never sent to M.J.B. Associates?

A No, sir.

Q That was the statement that was received from them during the course of the deposition, is that correct?

A Right, sir.

MR. STRASSBERG: Earlier this morning, counsel for the defendant made a concession that two and a half years ago, since the commencement of this action, or two years ago, he has now come up with a new statement for the month of May, 1972, which acknowledges that an additional six or seven thousand dollars is due to the plaintiffs. I call upon counsel in the interest of justice to produce the statement.

(Mr. Tessler handed a paper to Mr. Strassberg.)

MR. STRASSBERG: Could I see Plaintiff's Exhibit

2 10, your Honor?

3 (Paper handed to Mr. Strassberg)

4 MR. STRASSBERG: Inasmuch as this two-page
5 document has been turned over to me by the attorneys for
6 the defendant, your Honor, I would like to offer this in
7 as Plaintiff's Exhibit 11 in evidence.

8 THE COURT: Any objection?

9 MR. TESSLER: No, your Honor, no objection.

xxx 10 (Plaintiff's Exhibit 11 received in evidence.)

11 MR. STRASSBERG: Your Honor, the back-up sheet
12 entitled M.J.B. Commission Statement for May of 1972 that
13 is part of Plaintiff's Exhibit 10, says that the total
14 gross sales for the month of May, 1972, were some \$73,000.
15 That is part of Exhibit 10.

16 I would like the Court to note that Plaintiff's
17 Exhibit 11, which has just been turned over to me, indicates
18 close to \$200,000 in sales for the month of May, 1972.

19 MR. TESSLER: Your Honor, I object to Plaintiff's
20 counsel making speeches. He is in the middle of the interro-
21 gation of a witness.

22 THE COURT: Yes, confine yourself to questions.

23 MR. STRASSBERG: Can I call upon the defendant
24 to produce any other Commission Statements that he has
25 which are not copies of the ones that were attached to our

AFTERNOON SESSION

ROBERT ORENSTEIN, resumed.

THE COURT: All right, Mr. Strassberg.

MR. STRASSBERG: Yes, your Honor.

Could I just add one set of figures, your Honor, on this exhibit that was just given us?

DIRECT EXAMINATION CONTINUED

BY MR. STRASSBERG:

Q Now just to recapitulate, sir, I believe you testified that Plaintiff's Exhibit 10 in evidence, which is a statement referring to May, '72, was never sent to you. This was one that we received from the defendants and now we have received a new one. Is that correct?

A Yes, sir.

Q With a corrected number showing 200,000 in sales. Now, the goods that were sold by you in April of 1972, when would those goods have been shipped?

MR. TESSLER: I object, your Honor.

Q Let me withdraw that.

When were those goods for shipment?

MR. TESSLER: I object, your Honor. No basis, no foundation that the witness knows.

THE COURT: He can answer if he knows.

A July 30th complete usually.

1 mb-1f Orenstein-Direct 67 29
2 Q Does that mean prior to July also, June?

3 A Yes, sir.

4 Q And even some possibly in May?

5 A Yes.

6 Q Aside from not receiving a check for three
7 thousand odd dollars which the May statement showed were
8 for the other \$7,000, which the statement the defendants
9 now produced shows, did you receive any statement for
10 June?

11 A No, sir.

12 Did you receive any statement for July of
13 1972?

14 A No, sir.

15 MR. STRASSBERG: At this time I call upon the
16 defendant pursuant to the subpoena served upon it to pro-
17 duce the booking sheets of sales submitted by the plaintiff
18 to the defendant, the originals.

19 MR. TESSLER: Your Honor, I have a copy of the
20 subpoena that was served upon the defendant, and what has
21 been termed to be the booking sheets was not on the sub-
22 poena.

23 MR. STRASSBERG: Well, counsel, let me state
24 that during the course of the examinations before trial,
25 the defendant was requested to produce an original record

1 the month. I just don't see the relevance of that question.

2 THE COURT: I am inclined to agree. There is
3 no dispute that they are entitled to commissions on ship-
4 ments.
5

6 MR. STRASSBERG: I call upon the defendant to
7 produce any records it has of shipments for the month of
8 May, June, and July -- June and July and May other than
9 those already produced.

10 MR. TESSLER: The shipment, your Honor, for the
11 month of May has been produced originally marked -- one
12 statement was marked Exhibit 10, and a different statement
13 was produced by the defendant this morning, marked Plain-
14 tiff's Exhibit 11.

15 At this point I now hand to counsel Commission
16 Statements for June and July, if you will bear with me,
17 your Honor.

18 I am handing you, Mr. Strassberg, a Commission
19 Statement for the month of June, 1972, for the plaintiff's
20 account. As soon as I find the July statement, I will be
21 glad to give you that if I have it.

22 I hand you now, Mr. Strassberg, a statement for
23 the month of July, 1972.

24 (Plaintiff's Exhibit 13 marked for identification.)

25 Q Now, sir, I show you this document marked

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Plaintiff's Exhibit 13 for identification, which is a
purported Commission Statement for July of 1972, which
states on it "No sales." I ask you, was any copy -- is
that an original that we got from the defendant? Does
that appear to be an original?

A Just now? Yes, sir.

Q Is that an original?

A Yes.

Q Did you ever receive that in the mail?

A No.

Q Did you ever receive any statement about July
sales?

A No, sir.

THE COURT: You mean June.

Q June sales.

A No, sir.

MR. TESSLER: I think he is talking about July
sales, your Honor.

Q June, I apologize. That is the June, '72.

A Right.

Q Did you ever receive any statement about June
sales?

A No, sir.

MR. STRASSBERG: I will offer that in evidence

1 at this time, your Honor.

2 THE COURT: Any objection?

3 MR. TESSLER: Not to that, your Honor.

4 (Plaintiff's Exhibit 13 received.)

5 Q By the way, Plaintiff's Exhibit 13, which is
6 a Commission Statement which shows no sales, does it
7 give you some kind of charge-back for commissions on
8 supposed returns?
9

10 A Yes, sir.

11 Q You never received that in the mail?

12 A No, sir.

13 Q I show you this original statement entitled
14 Commission Statement for the Month of July which also
15 says "No sales" on it.

16 (Plaintiff's Exhibit 14 marked for identification.)

17 Q I show you Plaintiff's Exhibit 14 for identifica-
18 tion. I ask you if you ever received that in the mail.

19 A No, sir.

20 Q Although it shows no sales, it shows charge-backs,
21 doesn't it?

22 A I am sorry, can I have the question again, sir?

23 Q It shows no sales on that, doesn't it?

24 A No, it shows a credit though for us.

25 Q It shows a credit due to you?

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A Due L.J.B.

3

Q How much does it show as a credit due to M.J.B.?

4

A \$348.69.

5

Q Did you ever receive that?

6

A No.

7

Q M.J.B. ever receive a check?

8

A No, sir.

9

MR. STRASSBERG: Did the other one show a credit
by the way on the bottom line, your Honor?

11

THE COURT: No, I don't see it says credit here.
There is a balance due M.J.B. from the May 31st statement.

13

A \$63.95.

14

Q Did you ever receive that?

15

A No, sir.

16

Q Did you have occasion to go over to the New
York showroom of M.J.B. in June of 1972?

18

A Yes, sir.

19

Q When was the last time and where was the last
place that you ever saw the account cards that you main-
tained?

22

A At the 1400 Broadway showroom in June.

23

Q That was the showroom of M.J.B.?

24

A No, Mikey.

25

Q That was the showroom of defendant Dana Hall

1 that they opened up in January?

2 A Right, sir.

3 Q Those account cards, who originally bought and
4 paid for those account cards?

5 A M.J.B.

6 Q Whose employees wrote the figures on those
7 account cards?

8 A M.J.B.'s.

9 Q And you paid the salaries of the people that
10 wrote them down, is that correct?

11 A Right, sir.

12 Q Was there ever any discussion with respect
13 to your getting those account cards back?

14 A In the middle of June I believe it was, we
15 asked for the account cards --

16 MR. TESSLER: Objection, your Honor.

17 Q Who was asked for the account cards?

18 A We asked Mr. Katz for the account cards.

19 Q What, if anything, did Mr. Katz say?

20 A That he needs them to operate with because they
21 would have all the records of the accounts of what they
22 bought and what was shipped and the date they bought it and
23 their order numbers and what have you.

24 Q That was in June?

1 mb-1f Orenstein-Direct 86 35
2 THE COURT: All right.

3 MR. STRASSBERG: At this point I call on the
4 defendant if they have any similar shipping sheets that
5 would show Commission Statements for June or July on M.J.B.
6 orders to produce them. Do you have any other sheets
7 like this?

8 MR. TESSLER: No, Mr. Strassberg. The Commission
9 Statements for the months of June and July have been pro-
10 duced and have been entered in evidence.

11 MR. STRASSBERG: I have no further questions
12 of this witness, your Honor.

13 THE COURT: Mr. Tessler?

14 CROSS EXAMINATION

15 BY MR. TESSLER:

16 Q Mr. Orenstein, let's see if we can clear a
17 couple of points right up, shall we, and simplify this
18 case?

19 You said that under your original agreement
20 with Dana Hall, you were supposed to be paid on the sales
21 shipped but guaranteed seventy-five percent of all
22 credit-approved orders payable on a weekly basis.

23 A Right, sir, at eight percent.

24 Q Do I repeat your testimony accurately?

25 A At eight percent, sir.

1 Q At eight percent. Now as a matter of fact you
2 went out and sold goods in the month of May, 1971, didn't
3 you?
4

5 A I believe so, sir.

6 Q Did you sell a lot?

7 A I'd have to look at the records.

8 Q What is your recollection? Did you sell
9 \$10,000 worth of goods?

10 A No, I think it was more than that.

11 Q More than \$10,000?

12 A I believe so.

13 Q I show you this document and ask you if it is
14 not a Commission Statement for May, 1971.

15 A For May?

16 Q May, 1971.

17 A Of April shipping.

18 Q You weren't employed by the defendant in
19 April were you?

20 A At the -- this was what was shipped in April
21 at the last -- I believe it might have been the last
22 week he might have sent some goods in. The statement is
23 always tendys the following month.

24 Q I show you this document and ask you if it is
25 not a Commission Statement for the month of June, 1971.

1 A Yes, sir, it is a Commission Statement.

2 Q And I ask you to look at the back-up page to
3 that Commission Statement and ask you if that page does
4 not reflect shipments made during the month of June, 1971.

5 A Right, sir.

6 Q So that you would have received that statement
7 on or about July 10, 1971?

8 A Right, sir.

9 Q Reflecting June shipments?

10 A Right, sir.

11 Q May I see it, please?

12 (Handed to Mr. Tessler)

13 Q Do you recall how much goods you sold in the
14 month of June, 1971?

15 A I'd have to look at my records to be exact.

16 Q Was it more than \$10,000?

17 A I believe it was, sir.

18 Q Quite a bit more, wasn't it?

19 A Oh, maybe 25,000 if I am thinking right.

20 Q Would you tell the Court what the shipments
21 for June were as computed on that statement?

22 A The shipping was \$5,321.

23 Q Five thousand odd dollars?

24 A Right, sir.

1 mb-1f Orenstein-Cross 89 38
2 Q And the commission indicated on that statement
3 of \$391 reflects the commission on those shipments, is
4 that correct?

5 A Right, sir.

6 Q When you got that statement, Mr. Orenstein,
7 did you complain?

8 A No, sir.

9 Q Did you ever say to Mr. Savitsky or anyone
10 from the defendant, "Look, you are not paying us enough"?

11 A He paid us \$1,700.

12 Q As an advance, isn't that right?

13 A Against our bookings.

14 Q Against your bookings?

15 A Right, sir.

16 Q But was it an advance?

17 A It is paid on bookings, right. He calls it an
18 advance.

19 Q In fact, Mr. Savitsky gave you advances, paid
20 you advances throughout your relationship?

21 A Based on bookings, on credit-approved orders.

22 Q Based on credit-approved orders?

23 A Right, sir.

24 Q In this Commission Statement, it says, doesn't
25 it, June advances \$1,750. You have a commission of \$391.68,

1 mb-1f Orenstein-Cross 90
2 you have an overdraft account of \$737.05 showing total
3 deductions and an overdraft at the bottom of \$2,095.37.

4 Is that correct, Mr. Orenstein?

5 A Yes. May I explain it?

6 Q No. May I have that please?

7 A Yes.

8 Q Did you ever say to Mr. Savitsky, "You are not
9 paying us on seventy-five percent of credit-approved
10 orders"?

11 A Not that I remember, sir.

12 Q Did you ever complain that he was paying you
13 your commission based on shipments and not on bookings?

14 A No, sir, because we were paid on bookings.

15 Q As a matter of fact, isn't that exactly what
16 the deal evolved into, that you got a commission based on
17 the shipments?

18 A Well, let me explain this if I -- may I try?

19 Q Certainly. Let me try and see if I can help
20 you.

21 A I am sorry, what sir?

22 Q Let me see if I can help you.

23 MR. STRASSBERG: Your Honor, is there a ques-
24 tion before the witness?

25 THE COURT: Yes.

MR. STRASSBERG: The witness hasn't been allowed to answer.

A All right. Our deal, the original deal up to December 31st was to be paid on credit-approved paper, seventy-five percent of our credit-approved paper at eight percent commission.

That means that this man is advancing us money on our orders.

As he ships it, he in turn is getting back some of the money he advances. All of the money he advances actually.

If you look at December 31st -- rather -- yes, I guess the January statement -- you will find that we are in the red because of the money advanced.

Now, by going on to a new deal of being paid on shipping and the increase in our bookings and the increase in our shippings, eventually the red was wiped out.

Q Fair enough, thank you.

Let's go on to that new deal. In January of 1972 you had a new deal, is that right?

A Right, sir, we set it up in December.

Q You were going to be paid against shipments?

A Right, sir, and we offered --

Q You also got advances?

1 no-1f Orenstein-Cross 92

2 A Right, sir.

3 Q Which were credited against your commissions.

4 A Right, sir.

5 Q Starting at least in January of 1972, you

6 weren't being paid for bookings?

7 A No, sir.

8 Q Now, I am a bit confused, Mr. Orenstein.

9 There was some testimony by you this morning about seventy-

10 five percent or eighty percent of bookings. After January,

11 1972, continuing after January, 1972, and continuing until

12 the time you were terminated you were paid commission

13 against shipments actually made?

14 A Right, sir.

15 Q And by the way, from those shipment statements,

16 from the shipment receipts, you deducted returns, is that

17 correct?

18 A Right, sir.

19 Q Because you already got a commission on that

20 and since the goods came back you had to give the commission

21 back and --

22 A And a trade discount.

23 Q So it was a deduction. Fine. There was never

24 any question -- was there ever any time that you said to

25 Mr. Savitsky or anybody at Dana Hall, "Look, you are only

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paying us commissions on shipments, you are not giving us
seventy-five percent or fifty percent or eighty percent
of the goods booked?"

A No, sir.

Q You never said that to them, did you?

A No, sir.

Q And that's because that was then the deal, was
it?

A No, it was -- I think part of the confusion is
the fact that we had taken a line, if I may digress a
little bit.

Q Can you answer my question? You never said
that to Mr. Savitsky?

THE COURT: He has answered that.

Q That wasn't the deal, was it, Mr. Orenstein?

A Right, no, go ahead.

Q Pardon me?

A I don't understand the question.

Q From January, 1972, on, you were to be paid
commissions against shipments?

A Right, sir.

Q Without regard to the amount of those shipments?

A Right, sir.

Q As an percentage of the orders booked, et cetera?

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A Right.

Q Right. Thank you. By the way, you are independent sales representatives, I believe you testified?

A We were a corporation.

Q But you acted as independent sales representatives?

A Right.

Q You carried the Dana Hall line?

A Right, sir.

The Mikey line?

A Right.

Q Did you carry any other lines?

A Yes, sir.

Q In 1971 and 1972, how many other lines did you carry?

A Well, we started with a firm called TIJO California, and we maintained that line. And then we became involved with Mikey, Dana Hall.

Mikey was the line that we received. Dana Hall is the -- was Mr. Savitsky's request for us to take it, because of the job we were doing with Mikey. He was very satisfied and so on.

In between, we had a friend ask us if we could do some business with Charm, and then we had to go into a firm called Clancy once we were out of Mikey.

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Q So that during the time you were with --

A There were two or three other firms.

Q Two or three other lines that you maintained?

A That's right, sir.

Q And I believe that is one of the reasons you kept the 1375 Broadway showroom after January of 1972, is it not?

A Because of --

Q Because you were representing other lines?

A And Mikey.

Q Well, Mikey had its own showroom, didn't it?

A Well, we also kept Mikey there, too.

Q But you did keep other lines there?

A Right.

Q And you didn't keep other lines at 1400 Broadway, did you?

A No, that was, if I may reiterate, the rental and the telephone was paid by Mr. Savitsky.

Q The rental and telephone where?

A At 1400 Broadway. Were paid by Mr. Savitsky.

Q Right.

A And the lease in that particular building they do not allow representatives. You know, sales representatives. They have only manufacturers. Mr. Savitsky signed the lease.

1 mb-1f Orenstein-Cross 96

2 C He signed the lease and paid the rent?

3 A Right, but at that time 1375.

4 Q He signed the lease and he paid the rent?

5 A Yes, he did.

6 Q Thank you.

7 A That is why we gave back the one point to offset

8 that.

9 C All right.

10 A May I go on?

11 Q Go ahead.

12 A At the 1375 Broadway showroom, where we kept

13 TIJO and Mikey Dana Hall, there was an average between

14 three to five thousand dollars worth of Mikey business

15 being done there per day.

16 Q Are you finished?

17 A Yes.

18 Q Mr. Orenstein, by the way, Mr. Katz, Mr.

19 Jerry Katz --

20 A Right, sir.

21 Q -- was a principal in M.J.B. Associates

22 through April of 1972.

23 A Right, sir.

24 Q From January of 1972 to April of 1972, where

25 did Mr. Katz maintain his office?

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A At 1375 Broadway working at 1400 Broadway.

Q He worked out of 1400 Broadway?

A Yes.

Q That is where he spent his time, wasn't it?

A I am sorry?

Q That is where he spent his time?

A That's what we decided, yes.

Q 1400 Broadway?

A Right, sir.

Q The Commission Statement for the month of January, 1972, you did see that before this lawsuit?

A Yes.

Q Where was that mailed to? Wasn't that mailed to 1400 Broadway?

A I wouldn't know.

Q How about for February?

A I wouldn't know.

Q And March?

A I still wouldn't know because all records were kept at 1375 Broadway. All files were kept at 1375 Broadway except the account file for Mikey Junior Dana Hall.

Q You don't know, do you, where that Commission Statement was mailed? I think that is what you just said.

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A . It would be a corporation check, sir.

3

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Q Or was it paid by your attorney and was he reimbursed by the corporation?

5

A That I wouldn't know.

6

Q Who would know?

7

A I imagine it would be paid by the corporation.

8

9

Q If you could check the corporation's records, I'd appreciate it, Mr. Orenstein.

10

A We'll try to give it to you.

11

Q Thank you.

12

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14

A A lot of testimony has been given about orders. Would you tell me when you took an order in New York or on the road, it was a multipart order, wasn't it?

15

A Meaning what?

16

Q Meaning more than one part, more than one copy.

17

A Yes.

18

Q One copy went to California?

19

A Right, sir.

20

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Q Or more than one copy went to California, which was it?

22

A No, one, the original copy.

23

24

Q And at that time the order was subject to approval by the factor, correct?

25

A Right, sir.

1 Q It was understood that all goods were factored?

2 A Right, sir.

3 Q And that if the customer did not meet the
4 factor's credit requirements the goods would not be
5 shipped?
6

7 A Right, sir.

8 Q There is no question that if the goods weren't
9 shipped they were not commissionable to you?

10 A Right, sir.

11 Q Isn't it true, Mr. Orenstein, that as a matter
12 of fact, certainly through early 1972, a factor's disapprovals
13 ran about twenty percent of bookings?

14 A No, sir.

15 Q How much did they run?

16 A I wouldn't venture to say they ran over five
17 or ten percent for one reason.

18 Q Did you know what they were?

19 A Yes, for one reason.

20 Q What is that?

21 A Because between the time we started -- we
22 had never heard of United Factors -- from the time we
23 started until December of '71, we found that we were
24 writing business and losing it to United Factors so we
25 did not solicit those accounts any more.

1 Q Did you get three checks totaling \$3,000?

2 A Did M.J.B.?

3 Q I said did you, did you, Mr. Kleeman and Mr.
4 Katz get three checks totaling \$3,000? Yes or no.

5 A Yes, sir.

6 Q You didn't cash your check for a thousand
7 dollars?

8 A No, sir.

9 Q Did Mr. Kleeman?

10 A No, sir.

11 Q And Mr. Katz?

12 A I have no idea.

13 Q Did you return your check?

14 A No, sir.

15 Q Still have it?

16 A Yes, sir.

17 Q How about Mr. Kleeman, do you know if he re-
18 turned his check?

19 A No, sir.

20 Q And he still has it?

21 A Yes, sir.

22 Q On the June and July statements that were intro-
23 duced here in evidence and I can show them to you if you'd
24 like, there were returns indicated on that, correct?
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A Right, sir.

Q And those returns would be a credit against commissions, right?

A Right.

Q Tell me, Mr. Orenstein, after you terminated with Mikey and got your check for a thousand dollars, did you ever give Mikey any money back on account of those returns?

A No, sir, we did not.

MR. STRASSBERG: If it please the Court, he is misstating those exhibits that he produced today. Those exhibits, which I believe are Exhibits 13 and 14, show a balance due to M.J.B. on both of them. One, I think your Honor stated, was \$345 and the other about \$65.

THE COURT: Yes, but there was a negative balance because of the sales returns.

MR. STRASSBERG: I am sorry, your Honor. I was under the impression you had said a positive balance.

THE COURT: No.

Q I show you the June statement introduced as Exhibit 13, which shows a balance due from M.J.B. of \$55.45.

A Right, we are overdrawn according to your statement.

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Q Did you ever send that money back?

A We never saw the statement.

Q You never sent it back?

A We never saw the statement and we never got --
where is the shipping?

Q You never sent it back, Mr. Orenstein? Can
you answer that yes or no?

A I never saw the statement until this morning.

MR. STRASSBERG: Objection.

THE COURT: He has answered he didn't send it
back because he didn't get the statement.

THE WITNESS: Can I see the next one?

THE COURT: He will ask the questions.

THE WITNESS: I am sorry.

MR. TESSLER: May I have a minute, your Honor?

THE COURT: All right.

(Pause)

MR. STRASSBERG: May I approach the Bench,
your Honor?

(Discussion off the record)

Q In February, or January, I believe you testified
you booked 407 odd thousand dollars worth of goods.

A Right, sir. In what month?

Q Month of January, 1972.

1 A Right.

2 Q Based on shipments. As a matter of fact, toward
3 the end of that arrangement you knew Mr. Savitsky wouldn't
4 produce all you had booked, correct?
5

6 A No.

7 Q You thought that there would come a time that
8 he would produce?

9 A He had shown us the fact that he had bought
10 additional machines, that he was enlarging his manufacturing
11 facilities, that he found a better resource for fabrics down
12 in Florida, that he felt he can do and move faster.

13 Q All right. May I have that back? When you
14 got the February statement did you say to Mr. Savitsky,
15 "Hey, Mike, how come you only shipped so little? Why
16 don't you ship more?"

17 A No.

18 Q Did you say to him, "Mike, your statement is
19 wrong, you shipped more than you got credit for here"?

20 A No.

21 Q Did you ever say that?

22 A No.

23 Q How about in March?

24 A No.

25 Q Did you ever say, "The figures are wrong"?

I am not saying those are wrong.

Q That those statements as introduced into evidence show the correct level of shipments for January, February, March and April?

A May I see April?

Q Certainly.

A Thank you. That would be the only one I have got to question.

Q Certainly. How about January, February and March?

A I will take them all.

C No, no.

A I just want to see April for one reason.

Q Before we get to April, do you believe now that the statements --

A We never argued about the commissions due us for those months.

Q Which months?

A January, February and March.

Q All right.

THE COURT: Are you arguing about them now?

THE WITNESS: No, not really.

Q You are not arguing about that. Let's see if we can wrap up April, too.

THE COURT: Well, April is admittedly incomplete.

MR. TESSLER: No, it is May that was incomplete.

A That is what I wanted to make sure; that is the only thing. May is where the trouble comes in.

Q All right, so that you and I --

A We agree.

Q We agree.

A Right, sir.

Q The Commission Statements for January, February, March and April, 1972 --

A Shipping.

Q -- accurately show the shipments for the month?

A Less the returns, less the trade discount, and paid commission.

Q And accurately show the commissions due to M.J.B. Associates?

A As far as we know, sir.

Q For those months. So that all we are arguing about is May, June, July?

A Right, sir.

Q Thank you.

Let me ask you this, Mr. Orenstein: you testified as an expert this morning, and I certainly defer to your knowledge.

get paid on commissions; that is a standard practice,
isn't it?

A It is up to the individual.

Q Did you get paid mainly on commissions?

A With whom? With other firms?

Q Yes.

A No.

Q For TIJO, for instance, that you were representing --

A TIJO paid us on our credit-approved paper.

Q They paid you commission, that is what I am
asking.

A On our credit-approved paper, right, sir.

Q But a commission?

A Right, sir.

Q You were not on a salary?

A Oh, no, no.

Q That is what I am asking you. You got paid on
commissions?

A Right.

Q Mr. Orenstein, as somebody with fifteen years
experience as a salesman, wasn't it your practice to main-
tain copies of your orders?

A We did.

Q You did where?

1 A On the account cards.

2 Q Where were those?

3 A At the 1400 Broadway showroom.

4 Q Why weren't they at 1375?

5 A Because all orders that were written at 1375
6 Broadway starting in January were given to Jerry Katz
7 at the 1400 Broadway showroom starting in January, to be
8 marked on those cards and to be sent into Mikey Junior.
9

10 Q But you maintained no records of your own?

11 A Just the gross sales for that particular day.

12 Q Gross bookings?

13 A Right, sir.

14 Q With this new fall line that came in in April,
15 would you sell a line before you got samples? Would you
16 sell a particular style before you got a sample?

17 A We had -- again using your own words, the
18 line was hot, you know.

19 Q This was a new line, wasn't it, the fall line?

20 A Well, what I am trying to say is that if we
21 had style number one on a summer line, and style number
22 one was doing very, very well, if we called an account up
23 and said, "Look, we got new colors on style number one,"
24 they will say, "Give me 48 pieces, write the order for me."

25 We had open orders all the way down the line

direct, your Honor.

THE COURT: I think it might be better if you could go ahead and complete such redirect as you have now. It might save an extra day of trial if you can complete that now. I don't like to bring the jury back for an extra day if it isn't necessary.

MR. STRASSBERG: I agree, your Honor.

THE COURT: Obviously if you find anything in looking through those documents tonight and have to recall him for that purpose tomorrow, that is perfectly all right.

REDIRECT EXAMINATION

BY MR. STRASSBERG:

Did there ever come a time, Mr. Orenstein, when you communicated with the defendant with respect to a statement for May or June or July?

A I tried to.

Q When was that?

A In June.

Q How did you try to?

A By telephone.

Q Where did you call?

A The Los Angeles office of Dana Hall Mikey Junior.

Q Did you call once or more than once?

A Many times.

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Q Did you ever receive a May statement?

A No.

Q Did you ever receive a June statement?

A No, sir.

MR. TESSLER: Your Honor, I think that's been testified to on direct, that there was no statement received. This is just repetitious.

THE COURT: Well, he has already answered now.

Q Sir, did there come a time when you first learned that there might be additional monies due to you other than the monies you received?

A That was in early 1973.

Q From whom did you learn that there might be additional monies due to you? Just the name.

A Jackie Wilson, Miss Jacqueline Wilson.

Q By whom was Miss Jacqueline Wilson employed, if you know, in the first half of 1972?

A Mikey Junior, Dana Hall.

Q And until then were you aware of the fact that there might be some discrepancies in Commission Statements that had been handed you?

A No, no, sir.

Q Until then were you aware of any discrepancies in booking figures?

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2 MR. STRASSBERG: At this time if it please the
3 Court, a check in the sum of \$110 is being marked as
4 Exhibit 16 by consent of both parties, and another docu-
5 ment entitled "Form CT-240" together with a check in
6 the sum of \$10.55 is also being marked as Exhibit 17.

7 (Plaintiff's Exhibits 16 and 17 received in
8 evidence.)
9

10 THE COURT: I think you want the document that
11 is attached to the latter check.

12 MR. STRASSBERG: Yes, the document is CT-240
13 and the form number CT-240 together with the check
14 annexed.

15 May I proceed, your Honor.

16 THE COURT: Yes, please.

17 MR. STRASSBERG: At this time I call Miss
18 Jacqueline Wilson to the stand.

19 J A C Q U E L I N E W I L S O N, called as a witness
20 on behalf of the Plaintiff, having been first duly
21 sworn, was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. STRASSBERG:

24 Q Where do you reside, Miss Wilson?

25 A 930 North Westbourne Drive, Los Angeles,
California.

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1 Q Miss Wilson, in 1970 through sometime in 1973,
2 by whom were you employed?

3 A Dana Hall of California.

4 Q In what capacity were you employed by Dana
5 Hall of California?

6 A When I began my employment I was employed as
7 the full-charge bookkeeper. I was then promoted to office
8 manager and then later controller.

9 Q In 1972, in what capacity were you employed?

10 A In 1972, I was both office manager and controller.

11 Q Do you have any accounting background?

12 A Yes, I do, sir.

13 Q Could you tell us what that is?

14 A For approximately three years prior to being
15 employed by Dana Hall I was employed by Marcus Kalb, a
16 certified public accountant in the State of California,
17 as a junior accountant.

18 Prior to that I was employed as the office
19 manager-controller of a fairly large swim wear manufacturing
20 company, Multi-Corporation.

21 Q In your employment as office manager as controller
22 of the defendant Dana Hall of California, Inc., were you
23 familiar with the books of the corporation?

24 A Yes, sir.

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Q Were you familiar with the arrangement that Dana Hall had with M.J.B. Associates in January, February, March and April of 1972?

MR. TESSLER: I object to the form of the question, your Honor.

THE COURT: Overruled.

A Yes, I was familiar with the arrangements, sir.

Q Can you tell me what that arrangement was?

A January, 1972, the arrangement was seven percent commission on all shipments booked by the M.J.B. Corporation, three and a half percent commissions on shipments outside the M.J.B. original territory. In other words, where there was another salesman, the M.J.B. group was to receive one half of the regular commission.

Q I show you a copy of a document marked Plaintiff's Exhibit 10 in evidence, and I ask you if you recognize the handwriting on that document.

A Yes, sir.

Q Was that your handwriting?

A The top sheet is my handwriting. On the bottom it appears to be the handwriting of Mr. Savitsky. The sheet attached, part of the handwriting is mine from the portion of line nine, the left-hand column is mine and the two right-hand columns are that of a Berta Dominguez.

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Q It has been testified yesterday that the original of that statement was never mailed to the plaintiffs. Do you know --

MR. TESSLER: Your Honor, it was not so testified.

MR. STRASSBERG: It was testified yesterday that this was produced from the records of the defendant.

MR. TESSLER: It was testified yesterday, Mr. Strassberg, by Mr. Orenstein that he never received that statement. No testimony as to mailing.

MR. STRASSBERG: Withdraw the question.

Q Do you know if the original of that was ever mailed?

A To my knowledge, it was not mailed.

Q On that document what are the total sales indicated at full commission and the total sales indicated in half commission?

MR. TESSLER: Objection, your Honor. The document is in evidence and the document speaks for itself.

THE COURT: I think the figures have already been put in evidence.

Q I think the figures are approximately \$52,000. Is that correct?

MR. TESSLER: Objection, your Honor.

MR. STRASSBERG: Let me withdraw that question.

THE COURT: I think she can read from the document. This is a jury case and we want, I think, to put it all in context.

Q Can you read from the document and tell us the full commissions indicated on that sheet and the half commissions?

A The full commissions are comprised of two columns of figures, one representing the Dana Hall Missy dress line, the other representing Mikey Juniors, another line. The third is the half commission. The first two columns totaling approximately \$53,245. The half commission, \$20,818.25.

Q Is that a true and accurate reflection of the sales of the goods that were shipped in the month of May on E.J.B. orders?

A No, it is not.

Q I show you this document that was marked Plaintiff's Exhibit 11 in evidence yesterday that was produced by the defendant and his counsel, and I ask you to take a look at that document. Do you recognize the handwriting on the yellow sheet?

A Part of the handwriting is mine. Part is not.

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Q Can you tell us what that document represents?

A This represents the shipments that were made by Dana Hall for accounts booked by the M.J.B. Corporation through the shipment date May 25th.

Q When did you see that document last before today?

A Approximately December of 1972.

Q Was that document in the files of M.J.B. at the time you wrote out that commission statement?

A Was this?

Q Was this document, Plaintiff's Exhibit 11, in your possession when Plaintiff's Exhibit 10 was written out?

A This was in my possession when this was written out.

Q Did you have any discussions with Mr. Savitsky with reference to the discrepancy between the numbers on Plaintiff's Exhibit 11 and the numbers on Plaintiff's Exhibit 10 as to the amount of shipments on behalf of M.J.B. when you prepared that Exhibit 10?

A Yes.

MR. TESSLER: Objection, your Honor.

THE COURT: On what ground?

MR. TESSLER: On the ground that Plaintiff's

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crepancies?

A Exhibit 11 was discussed on May 26th, a Friday afternoon, when I was ordered to --

MR. TESSLER: Objection, your Honor.

Q All right. Will you tell us what the substance of the discussion on May 26th was, what Mr. Savitsky said to you, and what you said to Mr. Savitsky?

MR. TESSLER: Your Honor, at this time I renew the same objection I made earlier on the grounds that I don't see the relevance of this line of questioning in view of the concession made by the defendant at the commencement of the trial.

MR. STRASSBERG: If it please the Court, there is a second action here in which it is alleged that deliberate frauds were perpetrated by Mr. Savitsky and the defendant Dana Hall.

THE COURT: Overruled. You may answer.

A On May 26th, Mr. Savitsky came into the office sometime early in the afternoon when the paper-work was being prepared from which the figures that are on this sheet are normally listed, and he said to me and to -- in the presence of the girls in the office, "M.J.B. doesn't get any more commissions. They shouldn't be getting any. There aren't any more."

June.

Q That Commission Statement of May, you made that out sometime in the latter part of 1972. Is that what you just told us?

A Yes, sir.

Q So then according to the yellow sheet, Plaintiff's Exhibit 11, showing shipments on behalf of M.J.B. orders through May 25th, what was the gross amount on that sheet of full commissions?

A \$132,245.

Q That is at seven percent commission?

A Seven percent commission, sir.

Q And that would amount to roughly \$9,200 in commissions, is that correct?

A Yes, sir.

Q What does that sheet, Plaintiff's Exhibit 11, show for commissions at a half rate?

A \$59,828.25.

Q That would amount to about \$2,700, is that correct?

A Yes, sir.

Q In May of 1972, were additional shipments made on orders after May 25th, on orders taken by M.J.B.?

A Yes, sir, there were shipments made.

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2 Q Can you tell us approximately how much on
3 full commission basis and approximately how much on a
4 half commission basis?

5 A Approximately twelve to fifteen thousand dollars
6 on the full commission.

7 Q And on a half commission?

8 A Approximately eight thousand, five to eight
9 thousand, I would say.

10 Q Was there any discussion in the latter part of
11 May with Mr. Savitsky with reference to the sales organiza-
12 tion to be credited with shipments after May?

13 A We were told that there were to be --

14 MR. TESSLER: Objection, your Honor.

15 Q Just yes or no.

16 THE COURT: Yes, I had the place, the time of
17 the conversation, and who was there. And then state what
18 you said and what they said.

19 A Could you repeat the question, please?

20 Q Was there any conversations with reference to
21 any change in the name of the salesman to be credited with
22 shipments after May 25th?

23 MR. TESSLER: Your Honor, I am going to object
24 to the continual leading quality of Mr. Strassberg's
25 questions. I think it is improper to phrase the question

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2 that way.

3 THE COURT: Well, it is only introductory so
4 I will permit it.

5 A Yes.

6 THE COURT: Was there or was there not a con-
7 versation?

8 THE WITNESS: Yes, there was, sir.

9 Q Could you tell us what the substance of these
10 conversations were with respect to anything concerning
11 M.J.B. after telling us when and where they took place?

12 A As of May 26th, I was told --

13 MR. TESSLER: Objection, your Honor.

14 THE COURT: Yes. Where did the conversation
15 take place and who was there?

16 THE WITNESS: In the office of Dana Hall. The
17 office had approximately -- approximately ten women in-
18 cluding myself working there. Mr. Savitsky -- and the
19 conversation was between myself and Mr. Savitsky within
20 earshot of all the girls working in the one big office.

21 Q What was the substance of the conversation?

22 A I was told that as of that date, there was to
23 be no more M.J.B. -- any orders that were shipped were to
24 be shown as New York, and we were not to record them as
25 commissions -- or monies on which commissions would be due

M.J.B.

Q In June of 1972, were there any shipments made by Dana Hall or its Mikey Division, of goods that were on orders taken by M.J.B.?

MR. TESSLER: Your Honor, I am going to object because there's been no testimony by this witness to show that she would be competent in any manner to answer such a question. She was a bookkeeper. She wasn't in the shipping department.

THE COURT: Read the question, please.

(Question read)

THE COURT: Would you be in a position to know whether such shipments were made?

THE WITNESS: Yes, I would, sir.

THE COURT: All right, you may answer.

Q Answer the question, please.

A Yes, shipments were made on orders booked by the M.J.B. Corporation.

Q Were you familiar with the invoicing of bills of the corporation on all shipments?

A Yes, sir.

Q Were you in charge of it actually?

A No, sir.

Q Were you the one who prepared all of the

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Commission Statements?

A I prepared only the final portion of the Commission Statement. The back-up portion from which the figures were taken were prepared by other employees of the company.

Q Are you familiar with the amount of dollar volume of goods shipped in June that were from orders of M.J.B.?

MR. TESSLER: Objection, your Honor, same grounds as before.

THE COURT: Read the question, please.

(Question read)

THE COURT: That is a yes or no question. She may answer it.

A Yes.

Q Could you tell us how much in dollars on a full commission basis was shipped in the month of June and how much on a half commission basis?

MR. TESSLER: Objection, your Honor.

THE COURT: Let me ask you this: what was your basis of ascertaining these figures? How did you ascertain these figures?

THE WITNESS: Sir, I was responsible for the preparation of bookkeeping reports, the daily sales record

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amount, how much in total dollars were shipped.

I supervised orders that came in from salesmen, having access to the total dollars for each salesman, and after a certain period of time, sir, a certain pattern becomes established in terms of percentage of total by each salesman, both booked by them, and then shipped, of course, by them.

There was no prejudice shown in terms of orders. In other words, when orders were received, if \$10 belonged to salesman "A" and \$5 to salesman "B," the shipments were generally run in the same approximate percentage order in any given month. Of course, by 1972 I had been with the firm approximately two years.

THE COURT: She may answer. Do you recall the question?

THE WITNESS: I'd like it repeated, sir.

(Question read)

A On the full commission basis I would approximate between two hundred and two hundred twenty-five thousand dollars, and on the half commission basis, approximately sixty to seventy thousand dollars for the month of June, 1972.

C And in the month of July, 1972, can you tell us the amount of volume on a full commission basis and on

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2 a half commission basis?

3 A On the full commission basis I would say
4 approximately fifty to sixty thousand dollars. On the
5 half commission basis, approximately ten to fifteen thousand
6 dollars.

7 Q I show you these exhibits. I show you Exhibit
8 13 which is a statement prepared for M.J.B. Sales for the
9 month of June, 1972, and I ask you, is that your handwriting?

10 A Yes, sir.

11 Q Can you tell me when that statement was pre-
12 pared?

13 A Sometime in late 1972 at the same time that the
14 May, 1972, statement was prepared.

15 Q Was that around November or December of '72?

16 A November or December of '72.

17 Q At that time in November or December of 1972,
18 when you wrote "No sales" on here, did you know that that
19 was incorrect?

20 A Yes, I did.

21 Q And can you tell us whether or not you had
22 any conversations with Mr. Savitsky with reference to the
23 preparation of that statement?

24 A Yes, I had conversations with Mr. Savitsky.
25 I took my instructions from Mr. Savitsky regarding the

2 preparation of these statements.

3 MR. TESSLER: I object to everything after the
4 fact that she had conversations with Mr. Savitsky.

5 THE COURT: Yes. The jury is instructed to
6 disregard everything after the word "yes."

7 Q When and where did you have the conversation
8 with Mr. Savitsky with reference to the preparation of
9 that statement?

10 A In the office of Dana Hall at 860 South Los
11 Angeles Street in Los Angeles in November or December of
12 1972.

13 Q What, if anything, did he say to you with
14 reference to the showing of what the sales were?

15 A He said there were no sales. They were not
16 supposed to get any commissions for sales after the time
17 that we ended on Exhibit No. 11, which was then changed
18 to No. 10, so he told me that we were not to show any sales,
19 to show only the credits of returned merchandise.

20 Q I show you Plaintiff's Exhibit 14, which is a
21 July statement. Is that in your handwriting?

22 A Yes, sir.

23 Q Was that prepared at the same time as the May
24 and June statements?

25 A Yes.

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Q That was in November or December of 1972?

A Yes.

Q Would your answers with respect to the conversation and what was supposed to be reflected in that exhibit be the same as to the June statement?

A Yes, it would.

Q These were all at the request of Mr. Savitsky?

A Yes.

Q I show you this document marked Plaintiff's Exhibit 12, and I ask you if you recognize the same.

A Yes, I do.

Q Can you tell me when that was prepared?

A I can tell you when part of it was prepared, sir.

Q What is that statement supposed to reflect, do you know?

A This statement is supposed to reflect a recap of the total bookings by each of the salesmen of the corporation for that particular month shown on each line.

Q When does it start?

A It starts with April, 1971.

Q And when does it end?

A November, 1972.

Q Is your handwriting on any part of that statement?

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A Yes.

Q What part was prepared by you?

A The part starting with November, 1971, through and including November, 1972.

Q When was that prepared by you?

A December, 1972.

Q At whose request was that prepared?

A Mr. Savitsky.

Q Did you have a conversation with him with respect to the preparation of that document?

A Yes.

Q When and where did this conversation take place?

A In the office of Dana Hall at the same time or approximately the same time that I was preparing these other exhibits, Commission Statements.

Q Can you tell me what Mr. Savitsky said to you with reference to this document and what you said to him?

MR. TESSLER: Objection, your Honor. The document has been marked for identification.

MR. STRASSBERG: In evidence.

MR. TESSLER: It is not in evidence, Mr. Strassberg, unless my notes are wrong. It is marked for identification.

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2 MR. STRASSBERG: I have it in evidence, your
3 Honor. If it is not in evidence at this time I will offer
4 it in evidence.

5 MR. TESSLER: I will object, your Honor.

6 THE COURT: On what grounds?

7 MR. TESSLER: Your Honor, again this is a docu-
8 ment that was shown to Mr. Orenstein. It is a document
9 that purportedly deals with bookings by salesmen for the
10 months stated on the document. As Mr. Orenstein finally
11 testified yesterday after January of 1972 bookings were
12 totally irrelevant. Commissions were paid on shipment,
13 not on bookings or any percentage thereof.

14 THE COURT: We apparently don't have the record
15 of shipments so we will have to take the next best evidence.

16 MR. TESSLER: We have the shipping invoices,
17 your Honor, which I respectfully submit are the best
18 record of shipments.

19 MR. STRASSBERG: I believe, your Honor, the
20 witness has testified that the organization was directed to
21 change all shipping invoices after May 25th to reflect
22 only New York.

23 MR. TESSLER: Mr. Strassberg, that doesn't
24 mean that the shipping invoices do not correctly reflect
25 shipments regardless of who was given credit for the

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shipment.

MR. STRASSBERG: You mean they reflect the shipments but if we were entitled to the commission and they don't reflect it that's irrelevant? Is that what you are saying?

MR. TESSLER: Of course, it is not, Mr. Strassberg, and I object to that comment, your Honor.

THE COURT: All right, I am going to admit it into evidence. You can make your argument about its relevance to the jury.

MR. STRASSBERG: It was received previously.

Q You stated, I believe, Miss Wilson, that everything from November, '71, on was in your handwriting, is that correct?

A Yes.

Q And from November, '71, on, it was all prepared at the same time, in approximately December of 1972, is that correct?

A Yes.

Q And was it prepared as a result of a conversation with Mr. Savitsky?

A Yes.

Q This conversation you told us took place in the Dana Hall office in California in December of 1972, is

1 that correct?

2 A That is approximately correct.

3 Q Can you tell us what he said to you with
4 reference to the preparation of this document?

5 A He told me that he wanted --

6 MR. TESSLER: Your Honor, I would renew my
7 objection on a different ground to this type of question.
8 Your Honor is accepting the document as some evidence of
9 shipping since we don't have a separate shipping schedule.
10 In any event, I think that since commissions were not
11 based upon bookings, and that's been conceded by Mr.
12 Orenstein for the plaintiff, I think any conversation
13 that related to how this document was prepared is
14 irrelevant.
15

16 MR. STRASSBERG: If it please the Court,
17 the witness has already testified to shipments made in
18 June and July and the latter part of May. We have a
19 second cause of action here for fraud, and part of the
20 fraud is the fraudulent alteration of documents, your
21 Honor, and I respectfully submit the same is relevant
22 on that basis.

23 MR. TESSLER: Your Honor, if I might have
24 a minute, even assuming, which we do not concede at this
25 time, that the document was changed, this particular document,

1 since no commissions were payable on bookings, the true
2 amount of the bookings was immaterial and certainly the
3 plaintiff could not in any measure have been defrauded by
4 a change in the amount of bookings. I will concede that
5 if he can prove that shipments were changed that is a
6 different story but bookings are totally immaterial.
7

8 THE COURT: Well, I think it goes to the
9 matter of the fraud allegations. You can argue to the jury
10 the irrelevancy of changes in this schedule and they can
11 determine whether or not the changes, if any, have any
12 relevance. I will permit it but I think you should ask
13 her first where these conversations took place and when
14 and who was there.

15 MR. STRASSBERG: I believe she has already
16 testified that the conversation took place in approximately
17 December, 1972, at the premises of the defendant Dana Hall,
18 with Mr. Savitsky.

19 Q Was anyone else present at that time?

20 A Yes, there were many people present. The
21 girls who worked in the office.

22 Q Was this one large office?

23 A Yes, it was, and there were a great many
24 desks, as many as ten, all in one large area.

25 Q What, if anything, did Mr. Savitsky say to you

1 do and he told me he wanted me to show less dollars
2 booked in the M.J.B. column.
3

4 Q When salesmen got orders which they turned
5 over to you, if they came from the New York office there
6 would be a time lag between the time they booked it in
7 their records and the time you actually received the
8 order in California, is that correct?

9 A Yes.

10 C In the month of April of 1972, what does he
11 show or what does that exhibit show is the amount that
12 M.J.B. booked?

13 A M.J.B. --

14 MR. TESSLER: Your Honor, if we are going
15 into the precise figures, and in view of your Honor's
16 ruling a few minutes ago, I would appreciate it if your
17 Honor deems it proper, to instruct the jury that this
18 information has no bearing on the plaintiff's first cause
19 of action, that any bearing it might have would only be
20 on the second cause of action.

21 MR. STRASSBERG: Your Honor, I am prepared to
22 concede that all the alterations and misrepresentations
23 and changes we are proving are part of the fraud cause of
24 action.

25 THE COURT: All right, then I will instruct the

1 mb-1f
2 jury in view of that concession.

3 MR. STRASSBERG: I also want to say, however,
4 that some of them or at least that part dealing with the
5 shipments in May, June and July that she's testified to,
6 have bearing on both.

7 THE COURT: You are talking only about the
8 changes in this document?

9 MR. STRASSBERG: I am talking about the changes
10 in this document.

11 THE COURT: All right.

12 MR. TESSLER: Your Honor, I am kind of puzzled
13 at exactly what counsel has conceded then. If we have got
14 a document that relates only to bookings, is counsel con-
15 ceding that any information on this document relates only
16 to the fraud cause of action as he terms it? If not,
17 I would appreciate if the Court deems it proper if the
18 Court would instruct the jury that it does not relate to
19 the first cause of action.

20 THE COURT: What is your concession with respect
21 to that? Does this document relate in any way to the first
22 cause of action? I think it can relate to the first
23 cause of action in the question of the determination of
24 credibility of the defendant.

25 MR. TESSLER: On that, your Honor, I would repeat

1 mb-1f
2 in my question --

3 MR. STRASSBERG: In that respect I think it is
4 relative to both actions.

5 THE COURT: Well, I hope --

6 MR. STRASSBERG: It is showing a pattern here.

7 MR. TESSLER: I object to that comment, your
8 Honor.

9 THE COURT: No, that comment may be stricken
10 and the jury is instructed to disregard it with reference
11 to a pattern.

12 MR. STRASSBERG: I am sorry.

13 THE COURT: As I understand the concession,
14 it is that this document, Plaintiff's Exhibit 12, which
15 is a summary of bookings of various sales agencies of the
16 defendant Dana Hall, is introduced into evidence only to
17 show that there were alterations made in it which relate
18 to the second cause of action for fraud, and also which
19 relate to the credibility of Mr. Savitsky and other persons
20 associated with the defendant in connection with the first
21 cause of action. It is not offered to show the amount of
22 the commissions that should have been paid which were based
23 on shipments which had been paid pursuant to bookings and
24 not to bookings per se. Is that correct?

25 MR. STRASSBERG: Yes, your Honor.

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Q The April bookings that are on there indicate \$231,169, is that correct?

A That's what's indicated.

Q Is that the correct figure?

A No.

Q What was the correct figure, do you recall?

A \$321,169.

Q The 321 was changed to 231, is that your testimony?

A Yes, sir.

Q And is the figure for March correct?

A No.

Q Is the figure for February correct?

A No.

Q And is the figure for January correct?

A I don't believe so.

Q Can you tell us by approximately how much the March figure of bookings was reduced?

A I believe the March figure was reduced by approximately sixty or seventy thousand dollars.

Q And the February figure, by how many that was reduced?

A Between forty and fifty thousand.

Q And the January figure?

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Wilson-Direct

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A Between twenty and thirty thousand dollars.

Q Did you have a discussion with Mr. Savitsky when these figures were inserted?

A Yes, I did.

Q Did you insert these figures pursuant to Mr. Savitsky's instructions?

A Yes, I did.

Q Did Mr. Savitsky then take that document with him to New York?

A Yes, he did.

Q When Mr. Savitsky returned to California, did he have any discussion with you with reference to that document? Just yes or no.

A Yes, he did.

Q Can you tell us when or where this conversation took place?

A In the office at Dana Hall.

Q Approximately when?

A It was either late December or early January.

Q Of 1973?

A '72 or 3. January, '73, or December, '72.

Q And can you tell us the substance of the discussion he had with you in late December or early January with reference to that document?

1 A In reference to this document Mr. Savitsky
2
3 said upon returning from New York that I had not reduced
4 the numbers enough. He said the lawyer told him that we
5 should have reduced it more.

6 MR. TESSLER: Objection, your Honor.

7 THE COURT: The jury is instructed to disregard
8 the witness' testimony concerning what Mr. Savitsky
9 told her about what the lawyer had said.

10 Q Forget what the lawyer said. Just tell me
11 what Mr. Savitsky said to you.

12 A He told me that I hadn't reduced the figures
13 enough. I had a conversation further with him on that.

14 Q Concerning this matter?

15 A Yes, sir.

16 Q What was that conversation?

17 A I pointed out to him that on the last entry
18 for April I had transposed it and reduced it by \$90,000
19 and he said well, it still wasn't enough, and I again said
20 that I had, you know, been reducing the other figures "
21 lesser and lesser but each month going backwards, and he
22 says, "Well, it should have been more."

23 Q Did there come a time when you severed your
24 relationship with Mr. Savitsky?

25 A Yes.

1 mb-1f Wilson-Direct 176 89
2 Q And Dana Hall?

3 A Yes.

4 Q When was that?

5 A March 27, 1973.

6 Q What were the circumstances of your leaving
7 Dana Hall?

8 MR. TESSLER: Objection, your Honor. Has
9 nothing to do with the issues in this lawsuit.

10 THE COURT: I think it goes to credibility.
11 She may answer.

12 A Would you please repeat the question?

13 THE COURT: What were the circumstances of
14 your leaving?

15 A It was a very sudden leaving. I was very upset
16 that particular afternoon. Some discussion between Mr.
17 Savitsky and myself, and I had planned on working late
18 that evening. At about six o'clock Mr. Savitsky came
19 by the office, said good-night to me and two of the girls
20 that were working.

21 About a half hour later his son-in-law came by
22 to say good-night, and I started to have a conversation
23 with him to tell him that I was upset about the way Mr.
24 Savitsky had talked to me that day and I began to cry.

25 And I couldn't stop crying, and the girls that

1 mb-1f
2 were working tried to reach my doctor. They were unable
3 to do so, so they took me to the Veteran's Hospital out
4 in West L.A. where I was able to see a doctor.

5 At about eleven-thirty that night, I was feeling
6 better. I was able to talk, and I was able to breathe
7 normally, and I went for coffee with the two girls and told
8 them that I thought I'd be all right, I was able to go
9 home, but I gave one of the girls the key that I had to
10 the office and the ladies' room, and I said, "Please take
11 these back, I have a feeling I won't be needing them any
12 more."

13 Did you ever return to work thereafter?

14 A No, I never did.

15 Q That was the manner in which your relationship
16 was severed?

17 A I did not speak to Mr. Savitsky --

18 MR. TESSLER: Objection, your Honor. I don't
19 think that is responsive.

20 THE COURT: Yes, I think that can be answered
21 yes or no.

22 A Well, it was not the end of the relationship
23 in that sense, sir.

24 Q Was that the manner in which you concluded your
25 employment with Dana Hall?

1 A More or less, yes. It was the last time I
2
3 worked there.

4 Q Were you discharged or did you leave?

5 MR. TESSLER: Objection, your Honor. I think
6 the witness testified as to the facts.

7 THE COURT: She's given the circumstances I
8 believe.

9 MR. STRASSBERG: All right, I have no further
10 questions of this witness, your Honor.

11 THE COURT: All right, Mr. Tessler.

12 MR. TESSLER: All right, your Honor, may we
13 approach the Bench for a moment.

14 THE COURT: We will take our morning recess
15 now, ten minutes.

16 (Recess)

17 CROSS EXAMINATION

18 BY MR. TESSLER:

19 MR. TESSLER: May I have those exhibits from
20 which the witness testified?

21 (Exhibits handed to Mr. Tessler)

22 Q Miss Wilson, as part of your function as
23 office manager and bookkeeper and controller for Dana
24 Hall, was it your job to prepare the commission slips,
25 commission checks to M.J.B. Associates?

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A Yes, sir.

Q Have you worked part time since January, 1974, to the present?

A Yes, sir.

Q Miss Wilson, are you under psychiatric care?

A No, sir.

Q Have you ever seen a psychiatrist?

A Yes, sir.

Q Have you ever been under psychiatric care?

A Yes, sir.

Q When was the last time, Miss Wilson?

A Approximately six or eight weeks ago I was discharged.

Q You were discharged. Who were you being treated by?

A Dr. Alena Barakonsky.

Q Dr. Barakonsky is a psychiatrist?

A Yes.

Q How long were you under Dr. Barakonsky's care?

A I was under Dr. Barakonsky's care on a part-time basis from March 27, 19 -- excuse me, March 28, 1973, until the first week in August when she was transferred to another department and was able to take me as a regular

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full-time, you know, patient with a weekly appointment.

Q So from August, 1973, until approximately six or eight weeks ago, you saw Dr. Barakonsky on a weekly basis?

A Yes, sir.

Q How many times a week?

A Once a week.

Q Every week?

A Every week.

Q From March until August how often did you see Dr. Barakonsky?

A For the first week after March 27th, I saw Dr. Barakonsky or one of her assistants for six days.

After that I --

Q Six days straight?

A Yes, sir.

Q How many hours a day?

A Approximately one hour.

Q Where did you see the doctor or her assistant?

A At the Veteran's Hospital, the Brentwood Veteran's Hospital in West Los Angeles.

Q Were you a patient at the hospital?

A I was an out-patient.

Q Was there a time, during any of that time,

1 when you were an in-patient?

2 A For one day, sir.

3 Q Then you were an out-patient?

4 A Yes, sir.

5 Q Which meant you came in every day to see the
6 doctor or one of her assistants?

7 A For that one week.

8 Q Then after that one week?

9 A As the appointments were available.

10 Q On the average how many times a week did you
11 see the doctor or one of her assistants?

12 A I would take a guesstimate of approximately
13 once every two to three weeks.

14 Q Prior to March 27, 1973, were you ever under
15 the care of a psychiatrist?

16 A Yes, sir.

17 Q When for the last time prior to that date were
18 you under the care of a psychiatrist?

19 A Approximately 1967.

20 Q What was the name of that psychiatrist?

21 A Dr. Gordon Saver.

22 Q That was in 1967?

23 A Approximately.

24 Q How long did you see Dr. Saver?

1 mb-1f Wilson-Cross 189 95
2 MR. STRASSBERG: Your Honor, I didn't object
3 to any of the prior questions but I think that this which
4 has nothing to do with this case has gone on long enough.

5 THE COURT: Well, I have considerable doubt
6 about its weight but it is cross examination. She is
7 obviously a very important witness in the case.

8 MR. STRASSBERG: Fine.

9 THE COURT: And I will permit it to a reasonable
10 degree.

11 Q How long were you under Dr. Saver's care?

12 A From approximately 1962, I think, until 1967,
13 and there was about a one or one and a half year period
14 when I did not see him at all during that time.

15 Q When you were seeing Dr. Saver, how many times
16 a week did you see him?

17 A Towards the latter part of the treatment, I was
18 in group therapy with Dr. Saver once a week.

19 Prior to that, I saw him approximately once
20 every two weeks on an individual session, and was in the
21 group.

22 Q Miss Wilson, do you know the condition for
23 which Dr. Barakonsky was treating you?

24 A Yes, sir.

25 Q Will you tell the jury what that was?

1 mb-1f
2 A Anxiety.

3 Q Is that it?

4 A I believe the medical terminology was anxiety
5 neurosis.

6 Q How about Dr. Saver? Do you know the condition
7 for which he was treating you?

8 A The same condition, sir.

9 Q Are you anxious this morning?

10 A I am a little nervous.

11 Q It doesn't affect your memory, does it?

12 A It doesn't seem to, sir.

13 Q No, it doesn't. Tell me, Miss Wilson, did
14 there come a time when Mr. Savitsky told you that M.J.B.
15 Associates was no longer employed by Dana Hall?

16 A Yes.

17 Q When was that?

18 A Towards the latter part of April of 1972 he
19 told me that there would no longer be a M.J.B. Associates.

20 Q What did that mean to you?

21 A I asked him what exactly that meant and he
22 further explained it to me.

23 Q What did he say to you?

24 A He told me that Mr. Jerry Katz was going to
25 be employed by Dana Hall as a salaried employee, that Mr.

1 mb-1f Wilson-Cross 191 97
2 Mel Kleeman and Mr. Bob Orenstein would be employed as
3 individual salesmen covering particular territories after
4 May 1st of 1972.

5 Q Simply stated, Miss Wilson, didn't it mean
6 that -- can you fix the date of that conversation?

7 A Sometime within the last two weeks of April
8 of '72.

9 Q Was that after Mr. Savitsky had come back from
10 New York?

11 A No, I believe that that decision was made
12 after Mr. Katz had been in Los Angeles.

13 Q I wonder if you could pin that date down any
14 more accurately than sometime in the last two weeks of
15 April. Is it your recollection that it was in the last
16 five days of the month or between the 20th and 25th or
17 between the 15th and the 20th?

18 A I don't think I could be as specific as to
19 pin it down within five days. I could within the two
20 weeks.

21 Q Within the two weeks, sometime in the last two
22 weeks. Isn't it a fact, Miss Wilson, that after that
23 date, which was sometime in the last two weeks of April,
24 any orders written in New York and shipped thereafter were
25 not to be credited to M.J.B.?

1 A Was it. --

2 Q Isn't that true?

3 A I am sorry. Would you repeat the question?

4 Q On an order written in New York by Mr. Katz
5 after the date of that conversation, that order was not
6 commissionable to M.J.B., isn't that correct?

7 A No, that is not correct.

8 Q You mean M.J.B. got a commission on an order
9 taken after that date?

10 A It was my understanding that they were to re-
11 ceive commissions up to orders booked up to April 30 of
12 1972.

13 Q Did Mr. Savitsky tell you that?

14 A Yes, sir.

15 Q He said that even though M.J.B. was terminated,
16 Mr. Katz was working for the company, any orders that
17 Mr. Katz wrote up to April 30, 1972, were to be credited
18 to M.J.B.?

19 A Yes, sir, because Mr. Katz was not going to
20 become an employee of the corporation until May 1st.

21 Q All right. Let's take it as of May 1st. After
22 May 1st, how were orders to be credited that were written
23 in New York by Mr. Katz?

24 A The orders written in New York by Mr. Katz were
25

to be credited to the New York office.

Q Not to M.J.B.?

A No.

Q The orders written by Mr. Kleeman and Mr. Orenstein, were they to be credited to M.J.B.?

A They were to be credited to Mr. Kleeman or Mr. Orenstein, whichever was appropriate.

MR. STRASSBERG: Are we now talking about orders which are after May 1st which are outside the scope of this case?

THE COURT: Yes, I don't understand this, Mr. Tessler. There is no dispute about orders that were booked after May 1, 1972.

MR. TESSLER: I didn't know that was conceded, your Honor. I will certainly go along. If there is no dispute I will go along.

Q Miss Wilson, how many orders -- what was the dollar amount of shipments in January, 1972, on orders booked by M.J.B.?

A I don't remember, sir.

Q You don't know, do you?

A I said I don't remember.

Q Do you know today?

A Today, I do not remember.

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of the false Commission Statement, Plaintiff's Exhibit

10? To your best knowledge, in fact, the only person
who had a copy of the original statement, Plaintiff's
Exhibit 11, when you walked out of Mr. Savitsky's office
that day, was Mr. Savitsky himself, is that not so?

A Either Mr. Savitsky or the Dana Hall file.

Q All right. You had left them on Mr. Savitsky's
desk and to your knowledge that was the only copy of this
statement that existed on that day?

A As I said, I don't recall whether I --

Q To the best of your knowledge, please.

A To the best of my knowledge, sir, I don't re-
call having any other copy other than that, either putting
it on his desk and leaving it there or taking to back to
put in a file.

Q Do you remember taking it back to put in a file?

A I don't remember.

C In fact, I think you just testified your recollec-
tion was you left it on his desk.

A I believe I left it on his desk, sir.

Q In January, 1972, did you know that the commission
arrangement with M.J.B. Associates had changed?

A Yes.

Q Did you know that at least from January, 1972, on,

1 they were to be paid only on the dollar volume of
2 shipments during the month?

3
4 A I --

5 Q Let me rephrase that.

6 A Yes, your question is a little bit confusing in
7 terms of a change.

8 Q Let me see if I can make it less confusing.

9 In January, 1972, the commission arrangement
10 with M.J.B. changed?

11 A Yes.

12 Q From January, 1972, forward, was it not a fact
13 that they were to be paid commissions on the volume of
14 shipments made during the month?

15 A Sir, that was not a change from any other method
16 of paying them.

17 Q That is the way they were paid prior to that?

18 A They were paid prior at the end of each
19 shipping month, yes.

20 Q Based on the volume of shipments during the
21 month, the amount of goods shipped?

22 A That was the way they had been paid, yes.

23 Q Not the amount of goods booked?

24 A They were paid on bookings for a period of
25 time.

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Q From January, 1972, on?

A No, they were not paid on their bookings from January, and their actual payment computed after the end of the month, the actual commissions due them, were on shipments.

Q And so for the months of February, March, April, May, 1972, they got a commission based on the volume of goods shipped, the amount of goods shipped, correct?

A January through April of 1972 I paid them -- prepared the Commission Statements and sent checks out at the end of the month, which would have been the 10th of the following month or thereabouts.

Q Based on the dollar volume of goods shipped in the preceding month?

A Correct.

Q The month for which the Commission Statement was paid and the amount of goods that they had booked in that month or the prior month or the month before that was of no importance, isn't that so?

A Well, I don't know what you mean.

Q In determining their commissions.

A In determining their commissions?

Q In determining their commissions, it was of no

importance, is that correct?

A It had no relevance to their Commission Statement.

Q No relevance whatsoever?

A In preparing the Commission Statement there was no relevance.

Q All right. When you testified regarding Plaintiff's Exhibit 12 in evidence, which is a statement which has been colloquially identified in this courtroom as a booking statement -- I show you the exhibit, Miss Wilson -- that is the amount of goods booked, correct?

A It is not --

Q Aside from M.J.B.?

A It is the correct amount of dollars booked by each of the salesmen other than M.J.B.

Q But this statement, this amount of goods booked, be it correct or incorrect, had nothing to do, did it, Miss Wilson, with the amount of commissions that M.J.B. was to get?

A No. It had nothing to do with the commissions that they were to earn by the ultimate shipment of the orders.

Q By the way, was that the same practice, the practice of the company with regard to all of the other salesmen?

1 mb-1f Wilson-Cross 213 104
2 A Unless there was an automatic credit rating.

3 Q Then it wasn't phoned in?

4 A Then it was -- excuse me -- not phoned in.

5 Q When an order was phoned into the factor and
6 approval was given or automatic credit was given, where
7 did the order go then?

8 A By that time the order would normally have
9 been totally processed and ready for the shipping department.

10 Q When you say totally processed, what do you
11 mean?

12 A It would have been calculated in terms of total
13 dollar unit -- dollars on the order, total units.

14 Q Who would do that? Did you do that?

15 A I have done it.

16 Q Was that one of your regular functions?

17 A It was not a regular function.

18 Q Whose function was that regularly?

19 A The order clerks.

20 Q That was not yours? That was not you?

21 A No, I was not the order clerk.

22 Q Was there more than one order clerk?

23 A Yes, there was.

24 Q How many were there?

25 A It varied from one to three.

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1 mb-lf Wilson-Cross 216

2 Q Right, but you have done it on occasion?

3 A Yes.

4 Q How many billers were there?

5 A It ranged from one to three.

6 Q What did the billers put on the shipping

7 invoice? Put all the information?

8 A Depending on who was billing. Normally they

9 would try to put all of the proper information on the in-

10 voice.

11 Q Did they put the customer?

12 A The customer's name.

13 Q Address?

14 A Address.

15 Q Customer's address?

16 A Yes.

17 Q The style number?

18 A Before the style number was put on, sir, there

19 was a block approximately one-third of the way down

20 which called for the date, the customer's order number,

21 the department number, the salesman, and somewhere in

22 that area we would put the credit number. Then the style --

23 Q I am sorry, I thought you were finished.

24 Please finish.

25 A The bottom two-thirds of the invoice called for

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1 additional twelve to fifteen thousand dollars of shipments
2 on which full commissions were payable were made in 1972
3 on M.J.B. orders and approximately five to eight thousand
4 dollars in half commissions. Where does that information
5 come from, Miss Wilson?
6

7 A During the last week of any given month, it
8 was customary at Dana Hall that we would have the heaviest
9 shipping period of the month, and very often, it would run
10 even an extra day or two into the following month.

11 Percentagewise, based on the history of that
12 particular company, you could pretty much tell what total
13 percentage of the month would be shipped.

14 Q So you are approximating those figures?

15 A I believe I testified that I was approximating
16 the figures, sir.

17 Q You didn't see any document to give you a figure?

18 A The documents that I saw during that time were
19 the -- just total shipments for each of those days.

20 Q Total shipments, not broken down into salesmen,
21 by salesmen, were they?

22 A They were broken down into salesmen other than
23 M.J.B.

24 Q You testified that full commissions were payable
25 on shipments of two hundred to two hundred twenty-five

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of fact as your Honor well knows, counsel submitted a statement to the effect that even the invoices didn't exist, and that was filed with this Court and it was only until yesterday that we found invoices produced here.

I respectfully submit that on the basis of the testimony that has been adduced here, the jury can make a determination as to the amounts of the shipments.

MR. TESSLER: Your Honor, the basis of this motion is that at the end of the plaintiff's case --

MR. STRASSBERG: In addition to which --

MR. TESSLER: Just a minute, may I finish?

MR. STRASSBERG: -- there were some \$46,000, Plaintiff's Exhibit 15, in copies of salesmen's invoices for the month of June which were and are in evidence before this Court as a partial of that June shipment.

MR. TESSLER: Your Honor, I again say that aside from the difficulties in proving the plaintiff's case, the plaintiff has the burden of proof, and I respectfully submit that there is no evidence on which a jury can make an award of damages on supposed shipments because there is no evidence to show, other than a guess, an approximation, a recollection from a bookkeeper, as to what shipments must have been, and I submit that is not sufficient to go to the jury and your Honor should dismiss the first

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complaint at this time.

THE COURT: We have two problems with that. Problem number one is the fact that according to Mr. Strassberg he asked for these records much earlier, he was told they didn't exist, and on the eve of trial practically, three very large cardboard containers or files are in effect dumped on him and he is in effect told to find the needle in the haystack in time to get it in evidence before closing his case a day later, while being in court all the time in the meantime.

MR. TESSLER: Your Honor, as an officer of the Court --

THE COURT: Excuse me, let me finish.

MR. TESSLER: I am terribly sorry.

THE COURT: Point number two is the fact that he is convinced that looking at the records wouldn't do any good anyway because the names that appear on the invoices have been changed. M.J.B. has been replaced by New York, and there is no way of determining which shipments were made in response to orders booked by M.J.B. Of course, those records are equally available to the defendant, as a matter of fact even more so because the defendant has had them not just for the time of this trial but has had them ever since they were originally made two years ago.

2 Q Mr. Savitsky, where do you live?

3 A Los Angeles, Beverly Hills.

4 Q What is your occupation?

5 A Dress manufacturer.

6 Q Do you manufacture dresses by a particular
7 company?

8 A Yes.

9 Q Is that Dana Hall of California, Inc.?

10 A Yes.

11 Q Are you an officer of that company?

12 A Yes.

13 Q What office do you hold?

14 A President.

15 Q How long have you been president of the company?

16 A Since the company started in 1963.

17 Q The company is engaged in the same business
18 since 1963?

19 A Yes.

20 Q Do you manufacture a particular type of dress?

21 A We started with Misses dresses and then went in-
22 to both Misses and Juniors, discontinued the Misses, and
23 manufactured strictly Junior dresses.

24 We are currently manufacturing both Misses
25 and Junior dresses.

1 mb-1f Savitsky-Direct 255 110
2 Q What price range dress do you manufacture,
3 Mr. Savitsky?

4 A \$10.75 wholesale to \$22.75 wholesale.

5 Q Since 1963 has this been your chief occupation?

6 A Only occupation.

7 Q President of the company?

8 A Yes.

9 Q Where are these dresses manufactured?

10 A In Los Angeles.

11 Q Where are they sold?

12 A Nationwide.

13 Q How are they sold? Will you tell the jury
14 what your sales organization consists of?

15 A We have a New York office, and we have approxi-
16 mately fifteen men in various parts of the country who
17 represent us and travel on the road.

18 Q Are these persons full-time employees of
19 Dana Hall?

20 A No.

21 Q Are any of them full-time employees?

22 A I wouldn't think so.

23 Q What is your arrangement with these persons?

24 A They work on a commission draw, commission
25 against merchandise shipped.

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2 Q With regard to the plaintiff in this action,
3 M.J.B. Sales Associates, would you tell the jury
4 when you first heard of that organization and under what
5 circumstances?

6 A I believe, if my recollection is correct,
7 that Mr. Orenstein came into Los Angeles to see me.

8 Q Do you recall the date?

9 A No, I don't.

10 Q Would April, 1971, refresh your recollection?

11 A It would be around that time.

12 Q Did you have a conversation with Mr. Orenstein
13 at that time?

14 A Yes.

15 Q What was the substance of that conversation?

16 A Well, I told him that we were looking for
17 representation in New York, and he told me of his facilities.

18 Q What did he tell you exactly?

19 A He said that he had a showroom at 1375 Broadway
20 and he was representing a couple of people, a couple of
21 Los Angeles manufacturers, and he was looking for another
22 Los Angeles line, preferably in Junior dresses, he
23 wasn't interested in the Misses dresses.

24 Q At that meeting, did you and Mr. Orenstein
25 reach an agreement as to his employment or as to the employ-

1 interested in only M.J.B. in this case, and we are
2 interested in a specific period of time, and I don't want
3 to get into any general practice that he may have had
4 previously or at any other time or involving any other
5 parties. I don't think it is relevant or material to this
6 matter.
7

8 MR. TESSLER: Your Honor, I think this is
9 background which would be instructive to the jury.

10 THE COURT: I think there is a limit to the
11 usefulness of background material.

12 We are interested in M.J.B. and we are interested
13 in orders that were written in April principally, and
14 perhaps to some extent in March, and we are not really
15 interested in other lines except those for which orders
16 might have been written in those months.

17 MR. TESSLER: All right.

18 Q Mr. Savitsky, did there come a time when your
19 arrangement with M.J.B. was terminated?

20 A Yes.

21 Q And do you recall when that was?

22 A The first of April, first week in April probably.

23 Q Do you recall the circumstances that led up
24 to the termination of that arrangement? Why was it terminated?

25 A Because they weren't traveling.

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Q When did the samples for the fall line of 1972 go out to M.J.B.?

A The fall line didn't go out to M.J.B. The fall line was sent, I believe this to be a fact, the fall lines were sent to 1400 Broadway, and were picked up by these two gentlemen as salesmen.

They didn't have the fall line as M.J.B.

Q Mr. Savitsky, there has been testimony as to orders shipped during the month of May, 1972. What goods were those? Were they summer or fall goods?

A Summer.

Q Would there be any fall goods there, too?

A I doubt it.

Q Mr. Savitsky, there's been testimony as to orders shipped in June, 1972. What goods would those be?

A Fall.

Q And Mr. Savitsky, there's been testimony as to orders shipped in July, 1972. What goods would those be?

A Fall.

Q Not summer?

A No.

Q Now let's get right to it, Mr. Savitsky, to the heart of this case.

I show you Plaintiff's Exhibit 11 which is a

statement of sales, the back-up sheet is entitled M.J.B. Commission Statement, May, 1972, and I ask you when for the first time you saw that document.

A Last Thursday.

Q Thursday of last week?

A Right.

Q Would you tell the jury the circumstances upon which you saw that document? How did you come to see it, sir?

A I received a subpoena from our New York office that was the subpoena was issued and my New York showroom girl got it and mailed it to me, and the subpoena requested all the invoices from fourteen or fifteen months, and the account cards, and I asked the bookkeeper to put these -- everything related to M.J.B. that she had in the office, plus all those invoices and account cards be put in the showroom for me to look at.

And she did that, and with that, she gave me about four manila folders, and I went through the folders and there really wasn't anything that meant anything to me, and I also saw this, and this didn't mean anything to me, and I crumpled it up and I threw it in the wastebasket under my desk.

During the night, it bothered me, and I came

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in at eight o'clock that morning, and the boy that cleans my office -- and the wastebasket was empty and I asked the shipper who cleaned the office and he showed me the boy and I said, "What did you do with the wastebasket?" And he showed me a big barrel of refuse and trash that he had thrown in, and I said, "Tip it over," and I got this out.

And it was then that I realized what it was, that it was the Commission Statement for M.J.B. for May, 1972.

Q What did you do then, Mr. Savitsky?

A I brought it to New York with me and I apprised you of the fact.

Q I show you this document, photocopy document which has been marked Plaintiff's Exhibit 10 for identification, which purports to be a Commission Statement for May, 1972, for M.J.B. Associates. Have you ever seen that document before?

A Yes.

Q I ask you to direct your attention to the second page of that document, which is the back-up sheet that we have had testimony about.

A Yes.

Q Have you ever seen that document before?

1 mb-1f Savitsky-Direct 279
 2 writing?

3 A My writing is from April, 1971, to November,
 4 1971.

5 Q Do you recognize the writing appearing after
 6 November, 1971?

7 A It is not my writing.

8 Q Do you recognize whose writing it is?

9 A Well, all the handwriting from December
 10 through November is all the same I would say but --

11 Q Can you recognize it?

12 A I can't say that it is anybody's honestly.

13 Q Did you at any time in this period pay
 14 commissions to salesmen based on their bookings?

15 A No.

16 Q Mr. Savitsky, did you at any time instruct
 17 Miss Wilson or any other employee of Dana Hall to put
 18 false booking figures on that statement?

19 A Absolutely not.

20 Q Mr. Savitsky, what is a house account?

21 A A house account is when it is written in --
 22 like it is written in our office in 1400 Broadway, and
 23 because of the type of account, and the volume that we
 24 might get from the account, we don't give the salesman
 25 commission on that type of account.

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Q In 1971 and 1972, did Dana Hall have house accounts in New York?

A Yes.

Q Do you recall the names of any of those accounts?

A Phillipsborn, Brooks Fashions.

Q Was Commonwealth Trading a house account?

A Commonwealth Trading?

Q Was that a house account?

A Yes.

Q Were there other house accounts?

A Yes.

Q Were salesmen paid commissions on orders written from these accounts?

A No.

Q Mr. Savitsky, did you bring with you all of the shipping invoices of Dana Hall and Mikey Junior's for the period January through July, 1972?

A Yes.

Q Do these shipping invoices show the salesman for whom an order originated?

A Yes.

Q Is that the salesman who is entitled to commission on that order?

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A Yes.

Q Do the shipping invoices for the month of June, 1972, show orders originating in New York?

A I assume so.

Q Was M.J.B. entitled to commissions on those orders?

A If the statement says no, it is no.

Q Who would be entitled to commission on those orders?

A Whosever name appeared on the invoice.

Q If you had an order on which the name "New York" appeared, who would be entitled to the commission if anybody?

A New York.

Q Where did that order originate from?

A 1400 Broadway.

Q That was your showroom?

A Right.

Q After the termination of your arrangement with M.J.B., was Gerald Katz employed by Dana Hall?

A Yes.

Q Where did Mr. Katz operate from?

A 1400 Broadway.

Q So if an order was written at 1400 Broadway

1 mb-1f Savitsky-Direct 282 119
2 after the termination date, who would have written that
3 order if you know?

4 A Jerry Katz.

5 Q Would M.J.B. be entitled to a commission on
6 that order?

7 A No.

8 Q I show you Plaintiff's Exhibit 13, Mr. Savitsky.
9 I would ask you to tell the jury the amount of returns and
10 allowances contained on that statement.

11 A Returns are \$1,854 with eight percent trade
12 discounts --

13 Q Just the returns and allowances.

14 A \$1,854.

15 Q Attached to that statement, Mr. Savitsky, is a
16 sheaf of papers. Do you know what those papers represent?

17 A Yes, these are duplicate credit allowances
18 that our shipping department makes out when we get the
19 dresses back.

20 Q Do those papers relate in any way to the amount
21 of returns stated on the face of the statement?

22 A I would assume that this is -- these relate
23 to these returns completely.

24 Q I show you the statement for the month of
25 July, 1972, Plaintiff's Exhibit 14, and ask you what the

amount of returns on that statement is.

A \$1,923.

Q Likewise, are there attached to that statement copies of the credit memos issued on the returns?

A Yes.

Q Mr. Savitsky, this morning Miss Wilson said she terminated her employment with Dana Hall on March 27, 1973.

On or about that date, did you have occasion to have a conversation with Miss Wilson regarding the nature of her work?

A Yes.

Q Do you recall when that conversation took place?

A Well, she told me she was --

Q When that conversation took place.

A Sometime that afternoon.

Q Where did it take place?

A In her office.

Q Was anyone else present?

A I'm not sure.

Q Was the door closed?

A If I said anything to Miss Wilson, I said it to her by herself. I didn't include anybody else that was in the office.

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A Yes.

Q What did you say to her and what did she say to you?

A I told her that I didn't know why she had to work late with this other girl and --

Q What did she say?

A She said she had to get the books completed because the accountant was coming in the following Monday, I believe.

Q Did you say anything to her?

A I just left her there.

Q To your knowledge, Mr. Savitsky, were any shipments made in the month of June, 1972, to which M.J.B. was entitled to commissions?

A No.

Q And in July, 1972?

A No.

Q Was it part of Miss Wilson's function to compile booking records for the salesmen? Was that part of her function?

A I believe she compiled -- she put them together at the end of the -- she just entered them. She didn't compile them. She entered them at the end of the month.

Q That is the booking records?

1 mb-1f
2 A Right.

3 Q Would you tell the jury what, if anything,
4 Miss Wilson had to do with shipping records?

5 A Nothing.

6 Q Were shipping invoices delivered to her for
7 any purpose?

8 A No.

9 Q Was she the custodian of those invoices?

10 A No.

11 Q Did she receive compilations of the amount of
12 goods shipped during a particular day or month?

13 A No.

14 Q Did she ever receive any breakdowns --

15 A No.

16 Q -- in the regular course of business?

17 A No.

18 Q Let me finish the question, please -- of the
19 amount of any shipments made for the account of any
20 particular salesman?

21 A No.

22 MR. TESSLER: I have no further questions.

23 THE COURT: Is your cross examination going to
24 be extensive?

25 MR. STRASSBERG: I don't know, Judge. It

depends on what develops.

THE COURT: Let's take our afternoon break now.

(Recess)

THE COURT: Mr. Strassberg.

CROSS EXAMINATION

BY MR. STRASSBERG:

Q Mr. Savitsky, I believe you were here all during the testimony of Miss Wilson and as a matter of fact, a number of questions were asked of you by your attorney which required your having heard that testimony, and you did hear it all, didn't you, sir?

A Yes.

Q Isn't it a fact, sir, that when Miss Wilson started to work for you in 1970, she was earning about \$205, isn't that correct, sir?

A I don't know how much she was earning.

Q Will you accept my word for it that it was about \$205?

A If you say so.

MR. TESSIER: Objection, your Honor.

THE COURT: Overruled.

Q And will you accept my word for it that in 1973 by the time she terminated her employment with you she was earning in the area of about \$350 a week. Isn't that so?

1 mb-1f
2 A Yes.

3 Q And as a matter of fact, you told us that in
4 about November of 1972, you had a discussion with her
5 where you complained about her work, didn't you, sir?

6 A Yes.

7 Q Isn't it a fact that in December of 1972 she
8 received a bonus of \$1,200?

9 A Yes.

10 Q Isn't it a fact that in December of 1972 she
11 received a \$25 a week raise?

12 A Yes.

13 Q This is the employee whose work you were com-
14 plaining of because you always had to keep asking her, "Why
15 are you working late?" Isn't that so, Mr. Savitsky?

16 A She only worked late at the end of an audit
17 period, and she was usually three months behind on a
18 three-month audit.

19 Q Mr. Savitsky, since your attorney raised so many
20 questions about the subject, I just want to ask you, there
21 is nothing wrong, in your opinion, with somebody under-
22 going psychiatric care on occasion, is there?

23 A No.

24 Q As a matter of fact, you believe in it, right?

25 A No.

1 Q And after she wrote out these statements, after
2 compiling all the figures from the shipping, right?

3 A Yes.

4 Q And it was on the shipping figures that the
5 Commission Statements were sent?

6 A Yes.

7 Q Is that correct?

8 A Yes.

9 Q And so she was familiar with the shipping
10 statements, isn't that so?

11 A Yes.

12 Q Mr. Savitsky, a few moments ago your attorney
13 showed you this Plaintiff's Exhibit Number 14 and he asked
14 you about these yellow documents, and you told us that
15 these were credits for returns that you were claiming
16 against M.J.B., isn't that correct?

17 A Yes.

18 Q And that is an original statement?

19 A Yes.

20 Q And that statement and the so-called credits you
21 are talking about were never sent to M.J.B., were they,
22 sir?

23 A I never knew whether they were sent or not.

24 Q You have the original right here, isn't that
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correct?

A No, that's a - yes, those --

Q The original statement is right here?

A Yes.

Q Isn't it customary in your business to send the original statement, the credits, and the check with it?

A Yes.

Q So this original was produced here in court by you yesterday, right?

A I didn't produce that in court.

Q Your attorney produced it in court, correct?

A Yes.

Q And your attorney got it from you?

A Not yesterday.

Q Previous to yesterday?

A A year ago maybe.

Q A year ago?

A Two years ago.

Q And the same with the June statement, that also is an original Commission Statement?

A Yes.

Q Correct?

A Yes.

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Q And then the originals of these two statements were never mailed to M.J.B. now, were they?

A Apparently not.

Q And since the statements weren't mailed to M.J.B., the back-up material about these discussions weren't mailed either, is that correct.

A Apparently not.

Q So the first time M.J.B. knew about any claimed credit deductions was when we heard about it in this courtroom from you, right? Just a yes or a no.

A I can't really answer that question.

Q Well, if we never received any copies of these credit deductions --

A I honestly don't know whether there are other color copies for returns that they might have gotten.

Q I see, but you do know that you have the originals?

A Original statement sheet there.

Q Original statements?

A Right.

Q You heard the testimony of Miss Wilson this morning to the effect that these two statements for June and July were prepared in approximately December of 1972 at the same time as the May statement was prepared at your

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request?

A That's a lie.

Q Did you hear that testimony, sir?

A Yes. Yes.

Q Did you still maintain that you never told her what to write?

A Absolutely.

Q And, sir, you heard Miss Wilson testify that she wrote the months from November, '71, through November, '72, on this sheet that's Plaintiff's Exhibit 12, the booking sheet, is that correct?

A Yes.

Q And you heard her admit here that she altered the figures, isn't that so, sir?

A I heard her say that, yes.

Q Now, Miss Wilson has no interest in your business, does she, sir?

A No.

Q Miss Wilson derives nothing from any reversal of figures, does she, sir?

A No.

Q But assuming for a moment that you wrote "No sales" on there when there really were sales, then you would save a commission, would you not, sir?

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material to send it to New York.

Q Sir, were samples sent to M.J.B. in the month of April, 1972? Yes or no.

A No.

Q Now sir, I show you this invoice dated April 13, 1972, which was furnished me by your attorney as being one of the records of samples sent to M.J.B.

MR. TESSLER: I object, your Honor. If Mr. Strassberg would like to testify, let him take the stand but if he wants to know what a document is, let him ask the witness.

MR. STRASSBERG: Let's phrase it differently.

Q Is that a photostat copy of a sample charged to M.J.B.?

A Yes.

Q And does it say M.J.B. on it on April 13, 1972?

A Yes.

Q Does this one say M.J.B. on it on April 13th?

A Yes.

Q And on April 17th, does this one say M.J.B.?

A Yes.

Q And on April 20th, does this one say M.J.B.?

A Yes.

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MR. TESSLER: No objection.

(Plaintiff's Exhibit 18 received in evidence.)

Q Now, sir, did you ever at all at any time, aside from these instances that have been raised today, tell Miss Wilson to reduce figures?

A Absolutely not.

Q On any other documents?

A Absolutely not.

MR. TESSLER: I object to the form of that question, your Honor. It implies a fact which has not been proven.

THE COURT: I don't believe it implies anything. He just asked him whether --

MR. TESSLER: He said other than the times we talked about earlier today. That implies a fact.

THE COURT: He means other documents. Rephrase the question.

Q Sir, did you ever use the words "Get down more" to Miss Wilson in telling her to reduce figures on Dana Hall records? Yes or no.

A I not only didn't say it, I don't speak that way.

Q I am going to show you a little piece of paper, and I want you to tell me whether or not the words

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1 "Get down more" are in your handwriting? No, no, don't
2 look at the rest of it, just the words "Get down more."
3

4 A Yes, these are in my handwriting.

5 Q That is in your handwriting?

6 A Yes.

7 Q And, sir, as a matter of fact, among other
8 things, you told Miss Wilson to reduce your inventory
9 records, did you not, sir?

10 A Absolutely not.

11 Q You did use the words "Get down more"?

12 A That's written on that sheet of paper. I don't
13 know what that pertains to.

14 Q Are the numbers -- are the words "Get down
15 \$89,000" on the top of the other side in your handwriting,
16 sir?

17 A I don't know what this pertains to.

18 Q I am asking you if it's in your handwriting.

19 A Yes.

20 MR. STRASSBERG: May we have this document
21 marked?

22 (Plaintiff's Exhibit 19 marked for identifica-
23 tion.)

24 MR. STRASSBERT: At this time I would like to
25 offer that document in evidence.

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2 not contesting this other subpoena and I think it is a
3 misstatement to say that to the jury. It implies a fact
4 that is not so.

5 THE COURT: My understanding, and please
6 correct me if I am wrong, is that the contractual relation-
7 ship was terminated as of the end of April, and that Mr.
8 Katz was an employee of M.J.B. up to the end of April.

9 MR. TESSLER: I don't know. The witness would --

10 THE WITNESS: I think --

11 THE COURT: And the witness' statement that he
12 was getting a salary from Dana Hall for the last two weeks
13 of April is news to me, and presumably its news to Mr.
14 Strassberg, too.

15 THE WITNESS: Your Honor, I am not sure but I
16 think -- to my best recollection I think that he got two
17 checks in April from Dana Hall.

18 Q These records were produced here, three cartons
19 of them, yesterday and, of course, we were on trial all
20 day yesterday and during the lunch hour, I took the liberty
21 of spending it in here, and taking a look at it, and I
22 recall your Commission Statement that was produced for
23 the month of June showed no sales in June at all, isn't
24 that correct, sir?

25 A That's what it says.

1 mb-1f Savitsky-Cross 307

2 Q And that is based on your records, right?

3 A That's based on Dana Hall or Mikey Junior's

4 records.

5 Q Forgive me if I just pull these out a little

6 bit.

7 A I wish you wouldn't.

8 MR. TESSIER: Your Honor, we had that discussion

9 before.

10 THE COURT: Yes, I thought you weren't going

11 to remove them unless you had permission.

12 Q Take a look at invoice No. 5250. What is the

13 salesman on 5250's initials?

14 A M..J.B.

15 Q What was the date of that shipment?

16 A 7/7.

17 Q June 7th?

18 A Yes.

19 Q Take a look at 5236.

20 A That's a split commission statement for 5262.

21 Q Whose name is on there?

22 A M.J.B. and Weininger.

23 Q M.J.B.'s name is on there, isn't it?

24 A And Weininger, yes.

25 Q Take a look at 5235.

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2 A M.J.B. Weininger, \$103.

3 Q 5180. The amount of each one doesn't concern
4 me.

5 A It concerns me.

6 Q Sir, please limit your responses to my questions.

7 THE COURT: Yes, just answer the questions.

8 Q 1580.

9 A M.J.B. Weininger.

10 Q 5179.

11 A M.J.B. Weininger.

12 THE COURT: What is the date of that?

13 A 6/6.

14 Q June 6th. These are just a few on June 6th
15 and 9th, your Honor.

16 MR. TESSLER: Your Honor, I object to that
17 characterization.

18 THE COURT: Yes, the jury will disregard
19 counsel's statement that these are just a few.

20 Q 35175.

21 A M.J.B.

22 Q 5106.

23 A M.J.B., but --

24 Q What is the date of that, sir?

25 A But --

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THE COURT: What is the date of the last one, please, sir?

A 6/5.

Q Could I have that book a moment, sir?

A May I say something?

THE COURT: No. Your counsel will ask the questions.

Q Could I have that book, sir? Let me ask you a question.

Isn't it a fact that there came a time when you stated to your help at the end of May, 1972, that in the future all orders that were shipped on invoices from M.J.B. were to be booked as the New York office or house?

A If I said that, those five numbers would have been New York office, not M.J.B. I did not say that.

THE COURT: Excuse me, that can be answered yes or no, sir.

A No.

MR. STRASSBERG: I move that the balance be stricken, your Honor.

THE COURT: It may be stricken.

Q Isn't it a fact that we are dealing with hundreds of invoices every day?

A Yes.

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2 Q So that if a few invoices slipped by, it wasn't
3 really a substantial amount, was it?

4 MR. TESSLER: I object to the form of that
5 question.

6 THE COURT: Yes, sustained.

7 Did you ever send M.J.B. a check for
8 any commissions on those invoices?

9 A They were probably credited to Kleeman.

10 MR. STRASSBERG: I move that that be stricken.

11 Q Sir, we are talking M.J.B.

12 A They were probably --

13 Q Did you ever send M.J.B. a check for those
14 commissions?

15 A Apparently not.

16 Q Yes or no.

17 A No.

18 MR. STRASSBERG: Excuse me a moment. I am
19 just looking for another book.

20 Q Here is one on June 12th, 5853. Does that also
21 have M.J.B. on it?

22 A That's Agburn-M.J.B.

23 Q How about 5852, does that have M.J.B. on it?

24 THE COURT: What is the number of the last one,
25 please?

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2 MR. STRASSBERG: 5852.

3 A That is all the same store.

4 Q Is it M.J.B.?

5 A Agburn-M.J.B.

6 Q Same company, same order, Agburn and M.J.B.

7 Who booked those orders? New York, Kleeman.

8 A Jerry Katz.

9 Q It says M.J.B. on it, doesn't it?

10 A It could be an error.

11 Q I see.

12 A It could be an error in our shipping department.

13 Q Take a look at 5843 and see if we have another
14 error.

15 MR. TESSLER: Objection, your Honor.

16 THE COURT: Sustained. What is the latest
17 number now, Mr. Strassberg?

18 MR. STRASSBERG: 5843.

19 A This is definitely an error because it was
20 shipped out of stock on 6/12 and they weren't working for
21 us.

22 Q Right. And you were shipping against orders and
23 reorders, were you not, sir?

24 A This was shipped out of stock, 6/12.

25 Q Does it have M.J.B. on it?

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2 A Yes, it's an error.

3 Q Was M.J.B. supposed to get a commission on
4 orders and reorders?

5 A Yes.

6 Q Okay.

7 A Does this say reorder?

8 Q I haven't got the vaguest notion.

9 A Well, it doesn't.

10 Q Sir, take a look at this one that was shipped
11 on July 21st.

12 A That's definitely got to be a mistake.

13 Q What does that say on it?

14 A That's New York-Weininger.

15 Q Right. Now take a look up at the date when the
16 credit was approved on that order.

17 A 4/27.

18 Q And in April of 19 --

19 A The last week at least M.J.B. didn't work for
20 us.

21 Q April of 1972 M.J.B. was still getting samples
22 on April 28th.

23 A That's the fall line.

24 Q I see. On April 28th they got samples. That
25 order's credit was approved on the 27th?

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A That's the day we received it probably.

Q That doesn't mean you received it that day.

That means you got approval of credit?

A Booked, right, right.

Q Could have been received a month before that?

A I doubt it.

Q A week before that?

A I doubt it.

C I see.

A They didn't represent us the 27th.

C Sir, please just restrict yourself to answering my questions.

THE COURT: Yes, please.

Q Now, you brought all these books in, and as I say, you have to forgive me, because I only had a short period of time.

MR. TESSLER: Your Honor, I object again to counsel's speech.

THE COURT: Yes.

C Now, sir, these are your records in these five volumes of all the invoices shipped for the month of May, 1972, is that correct?

A Yes.

MR. STRASSBERG: If it please the Court, I offer

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2 these five volumes in as Plaintiff's Exhibit 20 in
3 evidence.

4 THE COURT: These are May?

5 MR. STRASSBERG: May, 1972.

6 THE COURT: Any objection?

7 MR. TESSLER: Your Honor, I certainly object
8 to the relevancy and if there was such a ground for the
9 objection, to the manageability of the exhibit but other
10 than that no objection.

11 THE COURT: I am going to admit them even
12 though, obviously, they are in a form now that makes them
13 virtually unuseable as far as the jury is concerned.

14 MR. STRASSBERG: I recognize that, your Honor.
15 I am offering them in on a technical basis. We have had
16 testimony with respect to certain -- to the fact that the
17 designation of the salesman was changed. I have had no
18 time --

19 MR. TESSLER: Your Honor, again I must object
20 again to this misstatement of testimony. There has been no
21 such testimony as to a change of any salesman on any invoice,
22 and I challenge Mr. Strassberg to show me and show the jury
23 an invoice on which there was a change.

24 MR. STRASSBERG: Miss Wilson testified --

25 THE COURT: He isn't saying that the records

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2 it is an imposition to ask to adjourn at this time. I
3 told Mr. Strassberg about the availability of these records
4 last Friday. Granted it was not terribly much notice
5 but I think under the circumstances, he ought to finish
6 the rest of his cross.

7 MR. STRASSBERG: Wait a minute. The records
8 were produced in this courtroom Monday morning for the
9 first time, at ten o'clock.

10 MR. TESSLER: Yes, but you knew about it Friday
11 morning, Mr. Strassberg, and you didn't say you
12 wanted them earlier.

13 THE COURT: I think resourceful counsel could
14 have had access to them earlier.

15 MR. TESSLER: Clearly, your Honor.

16 MR. STRASSBERG: Your Honor, I respectfully
17 submit we have a signed affidavit, a signed representation
18 by the attorneys for the defendant that these records
19 did not exist.

20 THE COURT: He told you Friday he had them.

21 MR. STRASSBERG: They were here Monday morning.
22 They were only shipped in Monday morning.

23 MR. TESSLER: Your Honor, Mr. Strassberg was
24 told Friday. They could have been here Saturday or
25 Sunday had he indicated a desire to look at them. He did not.

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Los Angeles we called it "House." When we sold it in New York it was "New York."

MR. STRASSBERG: If it please the Court, I think there was some testimony by Miss Wilson with respect to "House" or "New York" being used interchangeably on the M.J.B. orders and I will have her re-testify to that.

MR. TESSLER: I object, your Honor.

MR. STRASSBERG: I offer these documents in evidence, Plaintiff's Exhibit 21.

THE COURT: Is there an objection on that?

MR. TESSLER: Yes, your Honor, the objection is that there has been no proper foundation to show the competency of those documents, since there has been no testimony to show that any of these invoices represent orders that were taken prior to May 1st or prior to the date on which M.J.B.'s association was terminated, and without such evidence, the shipments themselves I submit, your Honor, should not be admitted.

THE COURT: I will admit the exhibit insofar as it contains invoices marked either "New York" or "M.J.B.," and instruct the jury that it is up to them to determine whether or not the invoices marked "New York" represent shipments on orders that were booked by M.J.B.

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 2 or by the New York office of Dana Hall after the contractual
 3 relation with M.J.B. ended as of April 30, 1972.

4 So I think they should be segregated. This is
 5 without prejudice to your establishing by other means
 6 that the expression "House" was, in fact, used on orders
 7 which had been booked either by M.J.B. or by the New York
 8 office of Dana Hall.

9 MR. STRASSBERG: And, of course, at that time,
 10 your Honor, the jury will be instructed that it is for them
 11 to determine whether these were --

12 THE COURT: Yes, at the present time they
 13 should be segregated though and I will admit them, I will
 14 admit those invoices which bear the legend either "New York"
 15 or "M.J.B."

xxx 16 (Plaintiff's Exhibit 21 received in evidence.)

17 THE COURT: Perhaps one of the other gentlemen
 18 can do that, Mr. Strassberg, while you --

19 MR. STRASSBERG: Yes, your Honor, I was just
 20 taking a glance at some of these for a different reason.

21 MR. TESSLER: Your Honor, in view of your
 22 Honor's ruling, not admitting into evidence at this time
 23 those invoices that do not say "New York" or "M.J.B." but
 24 say "House" or something else, I wonder if your Honor
 25 would instruct the jury to disregard the total of the

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package of invoices that Mr. Strassberg read out earlier, since the invoices admitted into evidence obviously total less, and I don't know how much less.

THE COURT: I didn't believe -- I guess there were figures, \$17,000 and \$8,000 mentioned.

MR. TESSLER: Right.

THE COURT: I will instruct the jury to ignore those total figures because we have excluded from the total at least for the present time, certain ones of the invoices which contribute to make up the total.

MR. STRASSBERG: If it please the Court, in order to save time, subject to your Honor's exact ruling with reference to the June and July invoices, with the consent of counsel I would like to introduce these exhibits into evidence.

THE COURT: I assume you make the same objection?

MR. TESSLER: Yes, I do, your Honor.

THE COURT: I make the same ruling.

MR. TESSLER: But, your Honor, I would again reiterate the objection, which takes on even more weight as we get further and further from the termination date.

THE COURT: That will be for the jury to determine, that is, whether or not shipments made in June and July were based on orders which were booked before

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2 the end of April at which time the contractual relation-
3 ship between Dana Hall and M.J.B. terminated.

4 MR. TESSLER: Your Honor, I think we are going
5 to hear something as to the exact date on which the
6 association was terminated. It is not conceded by the
7 defendant that it was April 30th or May 1st. In fact,
8 Mr. Savitsky has testified that it was his recollection
9 it was much earlier in the month of April.

10 MR. STRASSBERG: Mr. Savitsky has testified
11 to him things, including shipping samples on April 28th,
12 your Honor.

13 THE COURT: That will be for the jury to determine
14 then. I had understood that it was April 30th even though
15 there may have been some overlap between the termination
16 of the contract with M.J.B. and the commencement of the
17 operations at 1400 Broadway.

18 MR. TESSLER: That wasn't intended, your
19 Honor, and I don't want to certainly foreclose that as an
20 issue for the jury.

21 THE COURT: I thought that's what Mr. Savitsky
22 said but that is for the jury to determine.

23 You not only may, you are adjured to.

24 MR. STRASSBERG: At this time as Plaintiff's
25 Exhibit 22, I offer this group of invoices totaling \$24,000.

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MR. TESSLER: Objection, your Honor, to the total of the invoices.

THE COURT: Yes, don't read the total if that stack includes any invoices not marked M.J.B. or New York.

MR. STRASSBERG: Your Honor, there are some that are marked "House" so I won't read the total in on this stack.

MR. TESSLER: I don't think your Honor has permitted the whole stack to come in.

THE COURT: No, I make the same ruling.

MR. STRASSBERG: The same ruling goes on all of them.

THE COURT: They will have to be segregated. Not at the moment necessarily but before they are received in evidence.

MR. STRASSBERG: All right. Can we have --

MR. TESSLER: Your Honor, in that circumstance then, I would respectfully ask that the totals, the adding machine tapes on the front of each of the packets, be removed.

THE COURT: They will be excluded from evidence. If time permits running a new adding machine tape on the stacks after the exclusion of those not marked "New York" or "M.J.B.," then we will take a belated offer of the new

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2 tapes.

3 MR. STRASSBERG: Your Honor, I think I will
4 clarify that before these are presented to the jury, at
5 which point the tapes will be acceptable to the Court.

6 MR. TESSLER: I object to that statement.

7 THE COURT: No, the tapes will be amended.

8 MR. STRASSBERG: 22 then, your Honor, will be
9 the June invoices in evidence.

xxx 10 (Plaintiff's Exhibit 22 received in evidence.)

11 MR. STRASSBERG: As Plaintiff's Exhibit 23,
12 your Honor, we are offering in the July invoices with
13 the understanding that the same is subject to the objection
14 and ruling your Honor has made to the prior invoices.

15 MR. TESSLER: Your Honor, for the record I
16 would like to restate the objection.

17 THE COURT: I think it is pretty clear on the
18 record.

19 MR. TESSLER: I would again ask your Honor to
20 instruct the jury as you did with respect to the earlier
21 invoices.

22 THE COURT: I instruct the jury with respect
23 to both the June and July invoices just as I did with
24 respect to the earlier invoices, it is for the jury to
25 determine whether or not these represent shipments made

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on orders booked by the plaintiff, M.J.B. or whether they
do not.

(Plaintiff's Exhibit 23 received in evidence.)

THE COURT: Apparently with respect to those
marked M.J.B. there is no dispute. The only dispute is
with respect to those marked "New York." Isn't that
correct, Mr. Tessler?

MR. TESSLER: There is a dispute, your Honor,
with respect to all of the invoices, as to the date on
which the order was taken.

THE COURT: If it is marked M.J.B., you are
still going to dispute that.

MR. TESSLER: Yes, your Honor.

THE COURT: All right. The trouble is that
these invoices don't reflect the date on which the order
was taken, and I thought you'd be willing to concede that
if they indicated M.J.B. they were taken before the end of
April, 1972.

THE WITNESS: May I say something, your Honor?

THE COURT: Why not, everybody else is.

MR. STRASSBERG: Your Honor, could he be restricted
to --

THE WITNESS: June and July invoices would only
reflect fall samples.

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Junior had three digits.

THE COURT: So you can't tell from looking at the number of digits whether it is a summer item or fall item?

THE WITNESS: No.

THE COURT: Is there any other way that the jury might quickly tell whether or not a particular style number is a fall item or a summer item?

THE WITNESS: No.

THE COURT: All right.

Q Well, sir, you are positive that an order in July was for a fall item and was never booked for these people, is that correct?

A That's correct.

Q And you are absolutely certain of that, right?

THE COURT: Did you answer?

THE WITNESS: Yes.

Q Isn't it a fact that M.J.B. was to get commissions on orders and reorders from their customers?

A Yes.

Q And isn't it a fact that even if the order were taken in California, if it was for their territory, they got the credit for it?

A Yes.

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2 of them.

3 Q Sir, are you saying that when it was a house
4 account it was marked "New York"?

5 A No.

6 Q It was not marked "New York" if it was a house
7 account?

8 A The termination is different than what you --

9 Q Sir, answer my questions, please.

10 MR. TESSLER: Your Honor, I think that
11 counsel is unhappy with the start of an answer, so he is
12 trying to foreclose the remainder of the answer.

13 MR. STRASSBERG: Your Honor, it calls for a yes
14 or a no.

15 MR. TESSLER: That is counsel's conclusion,
16 your Honor.

17 THE COURT: Well, please, just answer the
18 question. Ask the question again, Mr. Strassberg. Please
19 just answer the question, sir.

20 Ask the question again.

21 Q Was "New York" used to describe house accounts?

22 A "New York" was to describe where the order was
23 written.

24 Q If it was a house account, was the word "New York"
25 put on it?

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A Yes.

Q So then the word "House" or "New York" could be on house accounts, is that correct?

A That's right.

Q Is that your testimony?

A That's right.

Q So instead of "New York," you might also have written "House" on the thing?

A If it were written in Los Angeles it would be marked "House." If it were written in New York, it would be marked "New York."

Q Didn't you say a moment ago that this was a house account?

A That's right, which means --

C Yes, it was written in New York.

A Which means house account in that termination means that the salesman doesn't get any credit.

Q Sir, in spite of your testimony that that was a house account --

MR. TESSLER: Objection, your Honor.

C It says "New York" on there, doesn't it?

A That's right.

MR. TESSLER: Objection to the form of the question and I think counsel is deliberately misstating the

REDIRECT EXAMINATION

BY MR. TESSLER:

Q Mr. Savitsky, on many occasions, does a store have more than one location, a particular chain?

A Well, there are many multiple unit stores, some with as many as 91 stores.

Q When a buyer for a chain comes in and makes an order, does he make a separate order for each store?

A No, he usually -- we get one order and a breakdown for how many dresses go to each store.

Q When you ship, do you ship a multiple order on one invoice?

A Sometimes we do. Sometimes we ship it to the individual stores.

Q When you ship to the individual stores you ship it on separate invoices?

A Yes.

Q But it all relates to the same order?

A Yes.

Q Mr. Savitsky, I show you Exhibit 23-A which is goods sold to Fashion Bug and I would ask you to tell the jury the order number on the shipping invoice.

A 21836.

Q I show you Exhibit 23-B which are goods sold

A Yes, yes.

MR. TESSLER: May we see, your Honor, Exhibit 21, the May invoices?

THE COURT: Let me ask Mr. Savitsky a question, please.

MR. TESSLER: Certainly.

THE COURT: Is Charming Shops a house account?

THE WITNESS: Yes, it is.

THE COURT: Is Fashion Bug a house account?

THE WITNESS: They are part of the same company. Some of the stores are called Charming Shops and some of the stores are called Fashion Bug, but it is a multiple unit operation.

THE COURT: That is a house account?

THE WITNESS: That's right.

THE COURT: No commission is credited to anybody on sales to either Fashion Bug or Charming Shops?

THE WITNESS: That's correct, your Honor.

THE COURT: All right.

Q Mr. Savitsky, did you factor your orders?

A Yes.

Q When you got an order in from a salesman, did you see if that order was credit worthy, that it had factor approval?

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2 A Yes.

3 Q Was a call made to the factor?

4 A Sometimes it was called in. Sometimes it was
5 mailed in.

6 Q When an order was called in for factor approval,
7 when did that factor approval result?

8 A Usually we would get it back the same day.

9 Q When you got factor approval, Mr. Savitsky,
10 was that noted on the shipping invoice?

11 A Yes.

12 Q We have here Exhibit 21 for the plaintiff which
13 is shipping invoices in May. Some of them bear a
14 notation "P.L." What does that mean, Mr. Savitsky?

15 A That is on a preferred list.

16 Q What does the preferred list mean?

17 A Which means we don't have to -- they have
18 unlimited credit and we don't have to call it into the
19 factor.

20 Q I show you invoice number 45901, which bears a
21 shipping date of May 31st. Would you tell the jury the
22 date on which credit approval was given to that order?

23 A May 25th.

24 Q Would you tell the jury the amount of that
25 order?

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Q Mr. Savitsky, in May of 1972, Mr. Katz became employed by Dana Hall, did he not?

A Sometime in April.

Q And he worked out of the 1400 Broadway showroom?

A Yes.

Q Were any goods that were booked and sold by Mr. Katz in April, 1972, shipped in May?

A Yes.

Q And June?

A Yes.

Q How about goods that were sold by him in May, 1972?

A Shipped in June and July.

Q When Mr. Katz sold goods after he was employed by Dana Hall, would the fact that he was the salesman appear on the shipping invoice?

A "New York" would be --

Q "New York" meant Jerry Katz?

A Right.

Q As an employee of Dana Hall?

A That's right.

MR. TESSLER: No further questions, Judge.

THE COURT: Mr. Strassberg.

RE CROSS EXAMINATION

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Orenstein-Direct

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colors of the spring and summer styles that were checking very strong plus the additional samples that he had sent at the time.

Q In April?

A Right, sir.

Q When you sold goods in May, Mr. Orenstein, what was the delivery date on those goods?

A Probably if I was on the road in the beginning of May, figuring May 1st, it would have been July 30th, complete "as ready" July 30th.

Q It wouldn't have been June, though?

A No.

Q It wouldn't have been May?

A No. Right "as ready." The meaning of "as ready"

Q Would it have been May? Would the goods have been sold for delivery in May?

A I sincerely doubt in my particular case.

Q How about goods that were sold in April? When was the delivery date on those goods?

A It would be a June or July including July 30th. It's up to the particular account.

Q How about May?

A May up to July 30th.

Q Mr. Orenstein, do you recall when you first got

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2 paid by Dana Hall for your work after May 1st, your work

3 individually?

4 A Yes, sir.

5 Q What was your first Commission Statement?

6 A Oh, as a Commission Statement?

7 Q Yes.

8 A No, I don't. I thought you meant pay draw.

9 Q No, what was your first Commission Statement?

10 A I don't remember it.

11 Q Would it have been June? Would there have been

12 shipments in June for goods that you sold when you were

13 no longer M.J.B. in June?

14 A There might have been but I don't know.

15 Q Do you think there were? What is your best

16 recollection?

17 A I don't know.

18 Q How about May, Mr. Orenstein?

19 A I am sorry, what?

20 Q How about May?

21 A What about May? Well, you got to understand --

22 Q Were there any shipments of goods in May?

23 A Because of a personal problem, I lost -- I

24 could not work the first two weeks in the month of May

25 except on Saturday which I went out and in the evening. I

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Orenstein-Direct

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could not, you know --

Q So that you really didn't start working individually for Dana Hall until after the second week in May?

A Actually the third week in May.

Q Actually the third week in May?

A Right, sir.

Q So that would you have had a Commission Statement for May reflecting May shipments for your own account?

A I sincerely doubt it. Unless there was maybe a question where I needed some goods in a hurry for a store and he shipped them.

Q Mr. Orenstein, I show you this document and ask you if you have ever seen it before.

A This is April.

C Would you read --

A This is a May statement?

Q What is it, please?

A A May Commission Statement.

Q Have you seen that before?

A I don't know.

Q Did you get a copy of that document?

A I don't know, I might have gotten one at home.

Q You might have gotten one at home?

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2 A Right, sir.

3 Q Mr. Orenstein, this is a Commission Statement?

4 A Right, sir.

5 Q With a back-up sheet addressed to Bob Orenstein
6 for commissions for the month of May, 1972, is it not?

7 A Right.

8 MR. TESSLER: I would ask that it be marked
9 for identification, your Honor.

10 (Defendant's Exhibit B marked for identifica-
xxx 11 tion.)

12 Q And attached to Defendant's Exhibit B for
13 identification is a back-up statement, is it not?

14 A Right, sir.

15 Q And that shows the date that shipments were
16 made of orders that you solicited, is that correct?
17 That's been the testimony in this court as to back-up
18 sheets, isn't it? Hasn't it?

19 A I think you are reading it wrong, if you look --

20 Q Can you tell me --

21 A May I?

22 Q Would you read to the jury what that says?

23 A On May 12th, I was paid on Mikey Junior \$234.50.
24 half commission, meaning that the order was booked in
25 New York and I was -- in my territory so I was getting half

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commission.

On May 15th, you did the same thing for the total of 67.. On May 18th it was \$385. On May 19th, 83. Not one of those orders was I worked on.

Q Not one of those orders did you work on?

A No, sir, I told you I could not do anything except in the evenings and Saturdays, if possible Sunday, for the first two weeks.

Q But those orders were shipped out on those dates, weren't they?

A Those orders --

Q That you got half commissions on.

A Right.

Q They were shipped out on May 12th, on May 15th, on May 18th?

A But I did not book them.

Q May 18th and May 19th?

A Right, sir.

Q They were shipped out on those dates?

A Right.

Q And they were booked prior to those days, right?

A Right, sir.

Q I believe you testified that May shipments

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2 represented pre-May bookings, isn't that correct, and
3 for goods to be shipped in May, on May 12th, they had to
4 be booked in April, didn't they?

5 A No.

6 Q Mr. Orenstein, there has been a lot of testimony
7 as to the missing week in the month of May, from May
8 25th to May 31st. Would you be kind enough to read to
9 the jury the date -- let me withdraw that.

10 When you got full commission, when you got
11 full commission, that meant you sold the order, is that
12 not so?

13 A Yes.

14 Q Nobody else?

15 A No, sir.

16 Q Would you be kind enough to read to the jury
17 the shipments on your Commission Statement for the
18 month of May commencing with May 23rd?

19 A Right. What you want me to read is on Mikey
20 Junior, on May 23rd, there was a shipment of \$67. On
21 May 25th, there was a shipment of \$59. On May 26th,
22 there was a shipment of nineteen hundred - or, you know,
23 group of shipments, could be more than one customer --
24 \$1,926.25. On May 30th, \$1,076. At full commission, and
25 \$301.50 at half commission. --

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May 31st, \$536; and on May 31st, \$50.25.

MR. TESSLER: Your Honor, I offer this document into evidence.

THE COURT: Any objection?

MR. STRASSBERG: Could I see it? I have no objection.

(Defendant's Exhibit B received in evidence.)

Q Mr. Orenstein, would you take my mathematics that in the month of May you received commissions on shipments totaling \$4,786?

A If you wish, can I wait until I bring in --

MR. STRASSBERG: Judge, I will concede that in May he received commissions -- that that document says he received commissions on \$4,000.

THE COURT: I assume that concession will dispense with the necessity of the question?

MR. TESSLER: I would think so, your Honor, yes.

Q You received fall samples in April, did you not?

A Yes, sir.

MR. STRASSBERG: If it please the Court, this is a direct witness at this time. He has previously been --

Q What kind of samples did you receive?

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2 A I believe I did.

3 Q And the back-up sheet attached?

4 A I did, sir.

5 MR. TESSLER: I offer it in evidence, your
6 Honor.

xxx 7 (Defendant's Exhibit E marked for identification.)

8 THE COURT: Any objection?

xxx 9 (Defendant's Exhibit E received in evidence.)

10 MR. STRASSBERG: I will make the same concession
11 with reference to June and July and try to save some time.

12 MR. TESSLER: I appreciate it but I'd rather
13 have them go in in due course, Mr. Strassberg.

14 Q Mr. Kleeman, would you be good enough to look
15 at the back-up sheet of Defendant's Exhibit E in evidence
16 and tell the jury the amount of shipments made during the
17 last seven days in May for goods that were sold by Mel
18 Kleeman?

19 A \$5,082, full Mikey, and \$351.75 for half
20 Mikey.

21 Q Will you accept my math that that totals
22 \$5,433?

23 A I accept it.

24 Q What I wanted you to do, Mr. Kleeman, though,
25 was to tell the jury by day starting the 24th of May and

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Kleeman-Direct

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2 indicate the date the amount of goods that were shipped
3 on each of such dates which represented sales made by you
4 prior thereto.

5 A You mean you want me to give you the dates and
6 amounts?

7 Q Yes, please.

8 MR. STRASSBERG: Your Honor, we just had a
9 total of it for those seven days.

10 THE COURT: Do you really need it day by day?

11 MR. TESSLER: I will pass it, your Honor.

12 Q Mr. Kleeman, would you agree with me that the
13 last seven days in May show shipments on each of those
14 days of goods that were sold by you?

15 A Yes, sir, that's right.

16 Q Did you receive, by the way, the commissions
17 indicated payable to you on that statement?

18 A Yes, sir.

19 Q You also contend, don't you, Mr. Kleeman, that
20 you are entitled or M.J.B. Associates were entitled to
21 commissions for goods shipped in the last seven days of
22 May, is that not so?

23 MR. STRASSBERG: If it please the Court, that's
24 been our contention, and as a matter of fact, there have
25 already been concessions to the effect of that.

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Kleeman-Direct

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2 MR. TESSLER: Thank you, Mr. Strassberg.

3 Q I show you this document, Mr. Kleeman, and ask
4 you if this is a copy of the Commission Statement for
5 you for the month of June, 1972.

6 A I believe this is right.

7 Q With a back-up sheet?

8 A Yes, sir.

9 Q Do you recall receiving the original of that
10 statement or --

11 A I recall I did.

12 MR. TESSLER: I offer it, your Honor.

13 MR. STRASSBERG: No objection.

xxx 14 (Defendant's Exhibit F received in evidence.)

15 Q I show you a three-page document, copy of a
16 three-page document and ask you if this is a copy of your
17 Commission Statement for the month of July, 1972.

18 A I recall I think receiving this.

19 MR. TESSLER: I offer that in evidence, your
20 Honor.

21 MR. STRASSBERG: No objection.

xxx 22 (Defendant's Exhibit G received in evidence.)

23 Q Now, Mr. Kleeman, will you accept my mathematics
24 that for the month of June you received commissions on
25 shipments totaling \$10,938? ..

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A Commissions on \$10,000 worth of shipping?

Q I am sorry, I withdraw that.

No, commissions on shipments totaling \$26,008 worth of shipments.

A For June?

Q For the month of June. Would you like to see the statement?

A You just gave it to me.

Q Yes, here it is again.

A Looks right.

Q Let me show you the July statement, Defendant's Exhibit G, and ask you if you will accept my arithmetic that that statement shows commissions on shipments during the month totaling \$20,684.

A That's right.

Q Pardon me?

A That's correct, sir.

Q These commissions, Mr. Kleeman, shown on these three statements, they were paid to you and not to M.J.B., is that correct?

A That's correct.

Q Mr. Kleeman, shipments made of goods sold by you shipped in the month of May, 1972, those were sold when, those goods?

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2 A Shipments made in May?

3 Q Shipments made in May on goods sold by you.

4 A That's correct.

5 Q When were those goods sold?

6 A In May.

7 Q In April, too?

8 MR. STRASSBERG: Oh, I object to that statement.

9 A No, sir.

10 THE COURT: It is cross examination.

11 Q There were not any goods sold in April?

12 A I was working for M.J.B., sir.

13 MR. TESSLER: I have no further questions of
14 the witness.

15 MR. STRASSBERG: I only have one question or
16 two.

17 CROSS EXAMINATION

18 BY MR. STRASSBERG:

19 Q I think you told us, Mr. Kleeman, that you last
20 saw the account cards in June of 1972 at 1400 Broadway,
21 is that correct?

22 A Yes, sir.

23 Q And when you received or when M.J.B. received
24 the statement, they used to check off the order as against
25 the statement on that account card, is that correct?

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gain from the changes you made at the request of Mr.
Savitsky?

A No, sir.

Q Do you have any malice toward Mr. Savitsky?

MR. TESSLER: I object, your Honor. That
certainly calls for a conclusion of the witness.

MR. STRASBERG: I certainly think the witness --

THE COURT: Well, I don't know who else can
testify about it other than the witness. You can cross
examine on the point. She may answer.

Q Do you have any malice to Mr. Savitsky?

A No, I don't, sir.

Q Do you have any grudges against him of any
kind?

A No. If I may add something to that --

MR. TESSLER: Objection, your Honor.

THE COURT: All right, sustained.

We had certain documents and as a bookkeeper
you stood here last night with the plaintiff's and you went
through the records that have been previously offered in
evidence, and when I refer to that I am referring to these
invoices, Exhibits 21, 22, 23, which represent sales for
the months of May, June and July, of 1972. These invoices
represent invoices from May 26th through the end of the

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2 month, is that correct?

3 A These appear to be -- yes, there's some May 26th
4 through the 31st here.

5 Q Were they all the invoices from May 26th through
6 May 31st or were they only part of the invoices?

7 A Just a part.

8 Q Can you tell me, in April of 1972 I believe
9 you testified that you had a conversation with Mr. Savitsky
10 with reference to changing the salesman on certain accounts
11 of M.J.B., is that correct?

12 MR. TESSLER: Not true, your Honor.

13 Q Did you test'fy --

14 MR. TESSLER: I think the witness said it was
15 in May.

16 A It was in May, sir.

17 Q In May? All right, that conversation that
18 took place in May, 1972, I believe you testified --

19 MR. TESSLER: Your Honor, this is Mr. Strassberg's
20 witness. I object to his restating her testimony and
21 prefacing all of his questions.

22 THE COURT: Well --

23 MR. STRASSBERG: I am only leading into the
24 questions, your Honor.

25 MR. TESSLER: That is the point, Mr. Strassberg.

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2 You are leading.

3 THE COURT: Well, I think for introductory
4 purposes it is all right. I will instruct the jury to
5 d'sregard anything that Mr. Strasberg says about the
6 witness' testimony. Your own recollection of what the
7 witness actually said is what will count.

8 Q Can you tell me in May of 1972 what kind of a
9 change was to be made?

10 MR. TESSLER: I believe the witness has already
11 testified to this precise question, your Honor, and
12 said that she was supposed to show "New York" and not
13 "M.J.B." This is all repetitious, not rebuttal.

14 THE COURT: I think there is a little ambiguity
15 in the previous testimony. I know that I raised one
16 question in our robing room conference about exactly what
17 she said so she may answer.

18 Q Could you tell us what the change was to be
19 made?

20 A The change that was to be made on Mr. Savitsky's
21 instructions were where the orders read "M.J.B.", the
22 sales, shipments were to be -- to read "New York."

23 Q Did the word "House Account" ever come up at
24 that time?

25 A Yes. The word "House Account" d'd come up after

2 the instruction had been given to the people who were
3 involved in doing this particular work.

4 MR. TESSLER: Your Honor, in view of the
5 witness' last statement that the instructions were given
6 to the people involved in doing the work, I move to
7 strike her entire previous testimony which was given on
8 the assumption the instructions were given to her.

9 THE COURT: Were these instructions given by
10 Mr. Savitsky to you directly or were they given to somebody
11 else?

12 THE WITNESS: They were given to me to disseminate.
13 The instructions were given to you to give to
14 the other people?

15 MR. TESSLER: That's what she said, Mr.
16 Strassberg.

17 Q Did you instruct the other people?

18 A I did instruct the people involved, sir.

19 Q And did there come a question as to the use
20 of the word "House" or "House Account"?

21 A Yes, there did.

22 Q Could you tell us exactly what happened with
23 relation to that word?

24 A The girls that were handling --

25 MR. TESSLER: Objection, your Honor, if she is

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doing anything but relating conversations between Mr. Savitsky and her. I think the rest is improper.

MR. STRASSBERG: I think she can testify as to any conversation she had with the people she gave the instructions to also, your Honor.

MR. TESSLER: I respectfully disagree with you.

THE COURT: I thought she was going to testify as to what other people were doing and I think some foundation has to be laid for that.

MR. STRASSBERG: Right.

Q Would you restrict yourself solely to conversations with these girls concerning the use of the word "House" or "House Account" on these sales invoices, shipping invoices?

MR. TESSLER: Your Honor, can we have the date of specific conversations? I object to just broad ranging testimony.

THE COURT: All right.

Q Can you recall who you spoke to and when?

A First conversation I had with the girls was on Friday afternoon, May 26th, and I spoke with Berta Dominguez, Shaney Thomas, Maria Gonsalves and I believe Zell Rogoff was still there. These are the girls who would have been involved in handling the sales invoices to

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2 separate them, to allocate the amounts to each salesman.

3 I instructed them regarding the "M.J.B." now
4 being shown as "New York" and I instructed them to handle
5 it as if it were a New York office, an extension, in a
6 sense, of a house -- in other words, it would be - I
7 explained it to the girls that it is like our showroom
8 in Los Angeles, only it is located in New York, and this
9 was how the word "House" came to be used by the girls
10 because they could better understand.

11 It seemed that it was difficult for them to
12 make a distinction between "M.J.B." and "New York,"
13 because in the past we had referred to "M.J.B." in the
14 office as "New York," so there was a conflict and it was
15 difficult for them to understand that "M.J.B." and "New
16 York" now meant two different, separate locations or what
17 ever it was.

18 It was easier to explain to them. Some of the
19 girls do have a problem in the English language.

20 MR. TESSLER: Objection.

21 THE COURT: Overruled.

22 Q Was the word "House", therefore, used as an
23 alternate or a synonym for "New York"?

24 MR. TESSLER: Objection, your Honor, as it calls
25 for a conclusion. She can testify as to what it was used for.

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2 Q What was the word "House" used for?

3 A It was often used interchangeably for the
4 New York showroom.5 Q The changes from "M.J.B." to "New York" or
6 "House" then were the same change?

7 MR. TESSLER: Objection, your Honor.

8 THE COURT: Yes, sustained.

9 Q You looked through all those records yesterday,
10 Is that correct?

11 A I tried to, yes.

12 Q What were house accounts, if you know, at the
13 office of Dana Hall in 1972?14 MR. TESSLER: Objection, your Honor. There is
15 no foundation that the witness is competent in view of
16 her duties to answer that question.17 THE COURT: Well, she was controller of the
18 company. She did compute the Commission Statements.19 MR. TESSLER: Only, your Honor, from back-up
20 sheets prepared by others, she testified to. She just
21 did the arithmetic. She had nothing to do with the
22 selling policies of the company according to her earlier
23 testimony.24 THE COURT: Why don't you ask her, Mr. Strassberg,
25 the basis for her knowledge, if any, of the meaning of the

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term "House Accounts"?

Q Were you familiar with the term "House Accounts" in the regular course of your business as an employee of Dana Hall?

A Yes, sir.

Q As the controller of the operation, you were familiar with many aspects of the business, were you not?

A Yes, sir.

Q As a matter of fact, when you looked through these invoice records, you found that many of the notations on some of these slips were in your handwriting, is that correct?

A Yes, sir.

Q As a matter of fact, is this one in your handwriting?

A Yes, sir.

Q And that is the addition of the invoices that were stuck on there as they were opened, is that correct?

A Yes, sir.

Q This is nothing you did last night?

A No, sir.

Q What was a house account or what did the word "House Account" mean?

MR. TESSLER: Same objection, your Honor.

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THE COURT: Overruled.

A I'd have to be specific, sir, in terms of which period I am talking about. From the period January, '72, through April, '72, I was informed that up until that point we had house accounts only in Southern California, and we had a list of certain major department stores in the Southern California area that were called house accounts.

I was also aware that Triangle Dress of Boston, Massachusetts, was a house account.

Other than that, and then during the period January through April, '72, I was informed that Phillipsborn should have been a house account.

Other than those specific accounts, I knew of no other house accounts nor was I instructed that there were any house accounts.

Q Other than your being informed in April of 1972 that Phillipsborn was to be considered a house account, was Charming Shops or Fashion Bug ever an account of Dana Hall prior to M.J.B.'s dealing with them?

A As I recall, Fashion Bug, which is part of the Charming Shops operation, had been sold a very small order several years before I went to work for the company, and then the order -- the first orders received in Dana

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Hall or Mikey Junior's while I was employed was when M.J.B. was representing the firm.

Q From April of 1971 through the termination of M.J.B., did M.J.B. get commissions on goods that were being shipped, or were they supposed to get commissions on goods shipped to the Charming Shops and Fashion Eugs?

A Yes, sir.

Q Would your answer be the same for Brooks?

A Yes, sir.

Q Where is Brooks located?

A 505 Eighth Avenue is their main office, New York City. They have approximately 60 stores in the New York State and other state area on the East Coast, and their merchandise is shipped directly to them but everything billed to 505 Eighth Avenue.

Q They were also in the East Coast territory of M.J.B., is that correct?

MR. TESSLER: He is leading the witness again, your Honor.

THE COURT: Sustained.

Q Cromwell or New England, have you heard that name before, Cromwell?

A Cromwell, I believe you mean Commonwealth Trading Corporation.

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2 Q Sorry. Commonwealth Trading Corporation.

3 A Yes, sir.

4 Q Was that an account on the East Coast?

5 A Yes, sir.

6 Q Was that an account on which M.J.B. was
7 supposed to get commissions on all shipments?

8 MR. TESSLER: Your Honor, I don't mean to keep
9 rising to object, but there has been no foundation that
10 this witness is competent to testify in this area.

11 MR. STRASSBERG: Judge, if the controller of
12 a corporation can't testify, who can?

13 THE COURT: I will overrule it on that basis.
14 You can go into her qualifications on cross.

15 Q Were they supposed to get commissions on
16 Commonwealth?

17 A To the best of my knowledge, they were, sir.

18 Q When you picked out these exhibits, in 21,
19 the invoices in 21, some of them included shipments to
20 accounts entitled "House," is that correct?

21 A Yes, sir, that's Denver, Colorado.

22 Q These accounts, were these part of the orders
23 obtained by M.J.B. on which the names had been changed
24 to show "New York" or "House"?

25 A To the best of my recollection these are all

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2 accounts where the salesman represented was not necessarily
3 as it appeared on the original order.

4 MR. TESSLER: Move to strike that answer,
5 your Honor, as not responsive to the question.

6 THE COURT: It seems responsive to me. In
7 what respect is it not responsive?

8 MR. TESSLER: She was asked if M.J.B.'s name
9 was changed, I believe, if I heard the question correctly.

10 THE COURT: Well, why don't you reframe the
11 question? I will strike the original question and answer
12 in view of what you just pointed out.

13 Q Is that group of invoices limited to invoices
14 that you recollect to be shipments on M.J.B. customers?

15 A Yes, sir, to the best of my recollection.

16 Q Even if the word "House" or "New York" is in
17 the salesman's books?

18 A Yes, sir.

19 Q Now for the last few days of May --

20 MR. STRASSBERG: At this point, your Honor, I
21 would like to reintroduce into evidence the exhibits as
22 compiled in their entirety exclusive of those with the
23 designation "House."

24 THE COURT: Any objection?

25 MR. TESSLER: Yes, your Honor, I don't believe

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the proper foundation has been supplied by this witness.

THE COURT: Well, I believe it is enough to go to the jury. The jury will determine whether or not there is enough evidence to satisfy it that the invoices which list the salesman as "House" were really sales which were booked by M.J.B.

MR. STRASSBERG: Thank you, your Honor. The same ruling to the Exhibits 22 and 23, I assume, applies to the balance of the invoices?

THE COURT: Yes.

Q When you compiled those invoices for May of '72, you removed any that were individually marked Orenstein or Kleeman or anyone else, isn't that correct?

A There are none of those included in any of these as best as I can recall.

Q And they don't include the invoices to any other salesmen anywhere in the country, isn't that correct?

A That's correct.

Q If I recall correctly, on your initial testimony you told us that your estimate was that in the last six days of May there was approximately \$125,000 in shipments that should have been credited to M.J.B. Is that correct?

A I believe that was about the estimate.

Q Could you tell me, approximately, what you have

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2 got totaled up on that tape?

3 A The combined total?

4 Q Yes, ma'am.

5 A \$25,758.35.

6 Q \$25,758?

7 MR. TESSLER: Objection, your Honor, I don't
8 think it is proper for Mr. Strassberg to attempt to
9 emphasize this to the jury by repeating it as if he
10 didn't hear it in the first place.

11 THE COURT: Yes.

12 MR. TESSLER: I think the jury heard it.

13 Q I believe you also testified that in your
14 opinion in addition to the approximately \$15,000 at
15 full commission, there would have been about \$8,000 in
16 half commission?

17 A Yes, sir.

18 Q That would have been about 23,000 and the total
19 you have got over here on this tape is 25.

20 MR. TESSLER: Your Honor, I have to object
21 again. I think it is totally improper.

22 THE COURT: It's been asked. The total is in
23 evidence already.

24 Now this is something you can do in your summa-
25 tion, Mr. Strassberg.

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2 MR. TESSLER: Your Honor --

3 MR. STRASSBERG: Well, I will cut it brief,
4 your Honor, in the interests of brevity. I will simply
5 state without the actual dollar computations.6 Q Would your testimony with respect to June and
7 July be the same with reference to the invoices, the
8 manner of selection, and what they represent?

9 A Yes.

10 Q Could I ask you what these three little sheets
11 of tape indicate?12 A The three tapes here represent the totals taken
13 from each group, the May group, the June group of books,
14 and the July group, the segregated portions of the books.

15 Q What was the amount for June, the total?

16 MR. TESSLER: Objection, your Honor.

17 MR. STRASSBERG: I am going to offer them in
18 evidence, your Honor, in a moment.

19 THE COURT: She may read the figures.

20 A For June, \$255,503.49.

21 Q For July?

22 A For July, \$229,793.12.

23 MR. STRASSBERG: Your Honor, I'd like to offer
24 these tapes in as an exhibit.

25 (Plaintiff's Exhibit 2) marked for identification.)

xxx

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2 MR. STRASSBERG: I offer them in evidence.

3 MR. TESSLER: No objection.

xxx 4 (Plaintiff's Exhibit 29 received in evidence.)

5 MR. STRASSBERG: I have no further questions,
6 your Honor.

7 THE COURT: All right. Mr. Tessler?

8 MR. TESSLER: Yes, your Honor, I do have some
9 questions.

10 CROSS EXAMINATION

11 BY MR. TESSLER:

12 Q You testified, I think, Mr. Savitsky gave
13 you a bonus of \$1,200 in December, 1972?

14 A Pardon me?

15 Q Mr. Savitsky gave you a bonus of \$1,200 in
16 1972?

17 A In December of 1972, yes.

18 Q He also gave you a raise?

19 A Yes, sir.

20 And I believe you testified that at the time
21 you left Mr. Savitsky, you were making \$325 a week?

22 A I did not testify at what salary I was making,
23 sir.

24 Q What salary were you making?

25 A My gross salary was \$305 a week.

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Wilson-Cross

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2 were invoices representing part of orders obtained by
3 M.J.B. Associates whose name was changed on the invoice.

4 MR. STRASSBERG: I object, your Honor. She's
5 testified that these invoices were part of the total
6 invoices for the periods involved, that she pulled out
7 those that she believed to have been M.J.B. invoices, and
8 where the name of the salesman was changed to "New York"
9 or "House." His statement is not that.

10 THE COURT: Why don't you rephrase the question,
11 Mr. Tessler.

12 Q Miss Wilson, is it your testimony that these
13 invoices represent invoices in which the name of the sales-
14 man was changed on instructions from Mr. Savitsky from
15 "M.J.B." to "New York" or to "House"?

16 A It is my testimony that --

17 Q Can you answer that yes or no?

18 THE COURT: Wait. She is going to try.

19 A No, I can't answer a straight yes or no.

20 Q Try it and then qualify it.

21 A These invoices that you have there represent
22 to the best of my ability invoices written by both M.J.B.
23 and what is referred to as the New York office, Mr.
24 Katz at 1400 Broadway.

25 Q Did Dana Hill have a salesman named Tobin?

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A Jim Tobin, yes, sir.

Q Where did he sell?

A Mr. Tobin was somewhere up in the Utah area or that part of the country.

Q You also testified according to my notes that these statements don't include commissions due to any other salesman besides M.J.B.

Q Those, any other salesmen that are on those sales invoices are on the split commissions, and those salesmen have been paid for their one-half of the commissions, sir.

Q Did they write house account business in Los Angeles?

A Yes, they did.

Q How was that noted on the Commission Statement on the shipping invoice?

A Just the name of the salesman because the salesman was to receive full commission if the order was written in the Los Angeles showroom.

MR. TESSLER: Could I have that answer read back, please, your Honor?

THE COURT: You may.

(Answer read)

Q So your testimony is that "House" only includes

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Wilson-Cross

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orders that were written in New York?

A That is not what I said, sir.

Q Then I am a bit at sea. What does "House" include, Miss Wilson?

A "House" can include a regular house account in the Southern California area, as an example the Broadway or May Company, or it could represent on the East Coast Triangle Dress in Boston was a house account. Phillipsborn, a house account.

Q Could it represent an order written anywhere but in New York?

A Could it represent an order written anywhere?

Q Written anywhere but in New York?

A Yes, it could.

Q Where else could that order have been written?

A It could be written by any salesman of the company in the United States.

Q I show you an invoice that says "House." How would you know where that order was written?

A The name of the store on that order, if you are referring to the top invoice, to May D and F, Denver, Colorado, is one of the large department stores that has in the past and in my experience with Dana Hall, bought up until that time, always out of the office in New York,

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2 known as M.J.B. Associates, as did most of the major
3 department stores in the United States.

4 Q All right, Miss Wilson. Are you able to look
5 at these invoices and tell me -- look at these invoices
6 for the month of May, 1972, the last five days in May,
7 shipments the last five days in May, can you tell me when
8 the orders for those goods were placed?

9 A Style 666, I could not tell. That style had
10 been running --

11 Q Can you tell me yes or no?

12 A No, I could not tell.

13 Q Take a look at the next one.

14 A This order was placed prior to April 27th.

15 Q Could you tell how much earlier than April
16 27th?

17 A I could not specify the exact number of days.

18 Q Thank you.

19 Take a look at the next one.

20 A Prior to 4/24.

21 Q How much prior?

22 A I don't know.

23 Q Take a look at the next order.

24 A I don't know.

25 Q You don't know when that order was written?

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Wilson-Cross

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A It is a "P.L."

Q A "P.L." means approved credit?

A Priority list, a limited amount of credit that may be shipped four times the weekly amount allowed by United Factors.

Q Looking at the next invoice which bears a date of May 31st, let me ask a question, please, if you don't mind.

Can you tell when that order was written?

A No, sir.

Q And the next invoice which bears a "P.L." mark.

A No, sir.

Q Can you tell when that was written?

A No, sir.

Q And the next invoice, Miss Wilson, can you tell when that was written?

A No, sir.

Q And the next.

A Prior to 5/25.

Q Prior to May 25th. How much prior? Can you tell if it was written during the month of May?

A No, I cannot.

Q Would you tell the jury now you can tell it was

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written prior to May 25th?

A Because the credit approval number represents the date of the month - the day of month - the credit number for this particular customer of United Factors.

Q So, Miss Wilson, if I may attempt to summarize, when you say an order was written prior to a certain date --

MR. STRASSBERG: I object to any attempts to summarize. If he wants to summarize or sum up, let him do it at the appropriate time. I respectfully submit that he restrict himself to interrogatories.

THE COURT: I want to hear the question first before I consider your objection.

MR. TESSLER: Thank you.

THE COURT: State your question, please.

Q The question is this: when you say an order was written prior to a certain date, are you referring to the date of credit approval for that date on which the order was written prior?

A Yes, sir.

Q In other words, an order could not have been written after the credit was approved?

A On a very rare occasion, credit was called to find out if an account was going to be approved.

If there is no credit approval date, if it is a

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P.L. account, is there anything on that invoice which would enable you to tell when the order was written?

A Not usually.

Q Not usually. Is it not so that requests for credit approval in many cases were made the same day an order was received?

A Usually the request was prepared the day the order was received.

Q And sometimes weren't those requests made by telephone?

A If it was a rush shipment, during that period it was made by telephone.

Q And sometimes credit approval was given that same day, is that not so?

A That is correct. However --

Q Thank you.

MR. STRASSBERG: Let her finish her answer.

THE COURT: Let her finish.

A However, if the credit was given back the same day, very often the credit number, which is usually a three-digit number, would not run anywhere from 001 to 0 -- or from 001 to approximately 150. It would ordinarily be a 500, 600, 700, or 800 number, because it would come from the credit department itself rather than the order

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board.

MR. TESSLER: Your Honor, I ask that that whole response be stricken. I don't think it qualifies the answer to the question.

THE COURT: Well, it isn't something that he can go into on redirect. It is something that the jury certainly should know, it seems to me, and in order to save time, wouldn't you agree that it can stay in rather than let him ask the question on redirect?

MR. TESSLER: All right, your Honor, if you would like, certainly.

Q Miss Wilson, if I showed you the June invoices that have been introduced into evidence and showed you the invoices that were marked "P.L.," preferred listing, I believe.

A Yes.

Q You would not be able to tell, would you, when any of those orders were written?

A No, I could not accurately determine the date that the order was written.

Q And if I showed you a June invoice which, for instance, had a shipping date of June 20th, and a credit approval date of June 10th, you could tell me, couldn't you, that that order was written prior to June 10th?

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2 A Yes, sir.

3 Q But you could not tell me how much prior, could
4 you?

5 A It could be any --

6 Q No, could you tell me?

7 A I could not tell you accurately, sir. It
8 could be --

9 MR. TESSLER: I object, your Honor.

10 A Excuse me.

11 THE COURT: That is good enough.

12 Q You could not tell me accurately?

13 A No, I couldn't, sir.

Q And, Miss Wilson, is there anybody at Bond
Hall who could tell accurately when an order, an invoice
which has a P.L. credit rating was written?

17 A They could perhaps not tell the date it was
18 written but they --

19 Thank you.

20 A Excuse me, sir.

21 Q I think you have answered my question.

22 THE WITNESS: Your Honor, I think they are
23 trying -- I can give an indication that there is a way to
24 establish when the order was received at Dana Hall.

THE COURT: Well, how -

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THE WITNESS: There are at Dana Hall several card files, 3 x 5 cards, on which are recorded the date an order is received, credit approved or not, total dollars of that order, and during the period when Dana Hall and Mikey Junior lines were both being shipped there was an indication of either D.H. for Dana Hall or M for the Mikey line because often there would be both orders received the same day.

Q Miss Wilson, when was the last time you were in Dana Hall?

A March 27, 1973.

C Getting back to my question which related to the shipping invoices that are in evidence here, is there anybody at Dana Hall who could look at these shipping invoices and tell from an invoice that has a P.L. rating when that order was received?

MR. STRASSBERG: I believe she just gave him a very good answer, your Honor, and these are some more records that were never produced.

THE COURT: All right. I will permit the answer, if she gives him the same answer he's gotten what he deserves by asking the question again.

Q I will rephrase it.

By looking at this invoice, can anyone at Dana

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2 Not only extremely difficult, Miss Wilson,
3 it couldn't be done, could it?

4 A I don't believe it could be done.

5 Q Yes or no?

6 A I don't believe it could be done.

7 THE WITNESS: Excuse me, your Honor, may I add
8 something to that, though?

9 THE COURT: All right, go ahead.

10 A It would appear to me that anyone who was
11 attempting to achieve this determination --

12 THE COURT: No, no, I am not going to permit
13 that.

14 THE WITNESS: Okay.

15 THE COURT: I don't believe that is responsive
16 to the question.

17 THE WITNESS: Sorry, sir.

18 Q Miss Wilson, with respect to an invoice that
19 has a credit approval date, again assuming that the person
20 looking at it had no knowledge of the style numbers and what
21 season they refer to, and such a person would only be look-
22 ing at the invoice which had a credit approval date, could
23 such a person tell in any way how much prior to that
24 credit approval date that order had been received?

25 A That information is available to someone who

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does not have knowledge of styles.

Q By just looking at the invoice, Miss Wilson?

A No, sir, not by just looking at the invoice.

Q Thank you.

Now, when Mr. Strassberg asked you if when you left Dana Hall on March 27, 1973, the order sheets for the period January through April, 1972, if they were still there, you answered, "I believe they were." And I believe I am quoting you accurately when I say you said, "I believe they were."

A Yes, sir.

Q Do you know for a fact whether they were?

A To the best of my recollection, they were in a separate box file on the floor in the shipping room.

Q When for the last time prior to March 27, 1973, had you had occasion to look at them?

A Probably the day before, or the week before.

Q When before that?

A The week before.

Q When before that?

A Possibly the week before that, sir.

Q You looked at them on the average once a week?

A I was usually having to refer to them about once a week.

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2 the documents; therefore, we couldn't rely on them, your
3 Honor.

4 THE COURT: It is not the documents that we
5 are talking about. It is other things such as borrowing
6 money and other injuries other than the failure to pay
7 commissions that were due, which is covered by your breach
8 of contract cause of action and which can be recompensed
9 only once.

10 MR. STRASSBERG: We will concede that, your
11 Honor.

12 THE COURT: All right. I will grant the
13 motion to dismiss the second cause of action for fraud.

14 MR. TESSLER: Your Honor, at this time, before
15 we sum up, I move to strike the exhibits consisting of
16 the May, June and July invoices. I don't have the numbers
17 of those exhibits -- yes, I do -- numbers 21, 22, 23 and
18 23-A, B, C and D, that your Honor previously admitted into
19 evidence, and the grounds for that motion are based upon
20 the testimony of plaintiff's own witness, Miss Wilson,
21 when she testified just a couple of minutes ago that nobody
22 looking at those invoices, those that are marked "P.L.,"
23 could tell when the orders were received that form the
24 predicate to those invoices, and that as to the other in-
25 voices that bear credit approval dates, and I submit, your

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Honor, that as to the June and the July invoices, I can't think of any and I looked through them quickly which bear dates prior to May 1st -- nobody could tell by looking at those invoices when the orders were received, and I submit, your Honor, that to introduce those -- to allow those documents into evidence, and to give them to the jury based on plaintiff's witness' own statement, would be extremely prejudicial and unfair to the defendant.

THE COURT: I am going to deny the motion because I believe that there is enough evidence to go to the jury. The jury, of course, will have the problem of attempting to determine when the orders were booked on which the shipments represented by those invoices were made. These are obviously not the best evidence that has ever been available but apparently they are the best evidence that's available now, and I will instruct the jury that it must determine when the orders were booked and must determine that the orders were booked during the contractual relationship between Dana Hall and M.J.B.

If we had better evidence than those invoices I might be inclined to agree with you that the invoices would not only no longer be the best evidence, but might even be prejudicial, but since we don't have any of the better evidence that at one time was available, for example,

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1 the order cards, and the original orders, then I have no
2 alternative but to let this go to the jury.

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4 MR. TESSLER: Your Honor, the basis of my
5 motion is not on the grounds that this isn't the best
6 evidence because, obviously, it isn't. I agree with
7 your Honor completely that the orders would be better evi-
8 dence. But the fact that this is the only evidence I
9 respectfully submit, is not sufficient, and the argument
10 that I am making is that notwithstanding the fact that
11 this is the only evidence, I submit that the jury on this
12 evidence would not be justified in determining when the
13 underlying orders were booked, and it is for that reason
14 that I ask that the evidence be stricken on the grounds
15 that the mere submission is so prejudicial as to deprive
16 the defendant of the right to a fair trial.

17 THE COURT: Well, you will have your opportunity
18 in your summation to point out the shortcomings of these
19 invoices as evidence of the date on which the orders were
20 booked.

21 I have no doubt of your eloquence and persuasiveness.

22 MR. TESSLER: Thank you.

23 THE COURT: In showing them the awesome gap that
24 exists between the booking dates and the shipping dates,
25 and insofar as the proof of the booking dates is concerned.

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2 MR. TESSLER: Your Honor, at this point I
3 would move to dismiss the first action on the grounds
4 that the plaintiff has not sustained its burden of proof
5 based on the evidence submitted and that based on the
6 evidence submitted there is not sufficient proof for a
7 jury to find for the plaintiff on breach of contract
8 case.

9 THE COURT: I will deny that motion.

10 MR. TESSLER: I have no further motions, your
11 Honor.

12 THE COURT: Mr. Strassberg?

13 MR. STRASSBERG: If it please the Court, I
14 move that the Court direct a partial verdict in the first
15 cause of action for monies due up to May 25, 1972 -- only
16 up to May 25th, as I say, your Honor --

17 THE COURT: That is May 1st to May 25th?

18 MR. STRASSBERG: Yes, for that period of time
19 alone, for the commissions referred to in the amounts
20 conceded in Exhibits 11, plus \$2,000 conceded to have been
21 received in uncashed checks, plus an additional \$1,000
22 that was paid to Mr. Katz, your Honor.

23 MR. TESSLER: Your Honor, on that, I will con-
24 cede on behalf of my client, the defendant, that Plaintiff's
25 Exhibit 11 indicates commissions due to the plaintiff of

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M.J.B. SALES ASSOCIATES

vs.

72 Civ. 2850

73 Civ. 2912

DANA HALL OF CALIFORNIA, INC.

April 25, 1974

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury, you are about to enter upon your final function as jurors in the case, and that is to decide the facts. As members of the jury, you are the sole and exclusive judges of the facts.

You alone pass on the weight of the evidence and the credibility of the witnesses, and the reasonable inferences to be drawn from the evidence.

It is my duty to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as you find them in your deliberations.

In your determination of the facts, you rely solely upon your own recollection of the evidence. What I may have said from time to time during the trial, either in ruling upon the objections of counsel or in asking questions of witnesses, is not to be taken by you as evidence in the case. No comments of counsel are evidence, and you are to draw no inferences either from anything I

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2 have said or anything that they have said. The rulings
3 that I have made have been solely on matters of law and
4 need not concern you. The questions which I asked of the
5 witnesses were intended merely to clarify the evidence,
6 and they should not be taken by you as indicating any
7 prejudgment or any disposition on my part one way or the
8 other with respect to the facts of the case.

9 You must also ignore any answers by witnesses
10 which were made either voluntarily or in response to
11 questions which were objected to and ruled out, and where
12 the answer was stricken. Those answers form no part of
13 the evidence and should not be considered by you in determin-
14 ing your verdict. The evidence which you should consider
15 consists only of the testimony given by the witnesses on
16 the stand, the exhibits which were introduced into evi-
17 dence, and any stipulations of fact which were made by
18 counsel during the course of the trial.

19 You should perform your duties with logic and not
20 emotion. Don't be swayed by who the parties are or by
21 who the attorneys are or whether you like the parties or
22 dislike them or whether you like the attorneys or dislike
23 them. Decide the case only on the evidence. You should
24 consider both direct and cross examination. You can draw
25 any inferences that appear to you to be reasonable from the

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2 evidence, but you shouldn't draw inferences based on other
3 inferences. You shouldn't base your verdict on speculation
4 or on conjecture, but on the evidence. You should con-
5 sider both direct and circumstantial evidence. Direct
6 evidence is where a witness who saw a thing or an
7 event testifies as to what he saw or heard or felt. In
8 other words, what he knows of his own knowledge, and which
9 came to him by virtue of his own senses.

10 Circumstantial evidence is evidence which
11 tends to establish one fact at issue by proof of one or
12 more other facts which have a logical tendency to lead
13 the mind to the conclusion that the first fact exists.
14 The law makes no distinction between the weight which
15 should be given to direct evidence and circumstantial
16 evidence. Both should be considered by you in determining
17 your verdict.

18 In this, as in every case, we begin with the
19 fundamental principle that the plaintiff, having brought
20 the suit, has the burden of proving the material allegations
21 of the complaint by a fair preponderance of the credible
22 evidence. The term "fair preponderance of the credible
23 evidence" means the greater weight of the evidence rather
24 than the number of witnesses. It means that the evidence
25 in behalf of the party on whom rests the burden of proof

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2 must have more convincing weight than that of the opposing
3 party. You may say that a fact has been proved by a fair
4 preponderance of the evidence when, after considering all
5 of the credible evidence relating to that fact, you are
6 persuaded to believe the existence of the fact. If you
7 find that the credible evidence relating to a particular
8 fact is evenly divided between evidence tending to prove
9 that fact and evidence tending to disprove it, then you
10 must conclude that particular fact against the party who
11 has the burden of proof as to that fact.

12 As I have said, the burden is on the plaintiff
13 as to the necessary elements of the claim.

14 Thus, in this case if after considering all the
15 evidence relating to the necessary elements of the plain-
16 tiff's claim, you find that the evidence in favor of the
17 plaintiff is of greater weight than that in favor of the
18 defendant, then the plaintiff has sustained its burden of
19 proving the case by a fair preponderance of the evidence.
20 If on the other hand the credible evidence is evenly
21 divided, or if the balance is in favor of the defendant
22 with respect to the necessary elements of the plaintiff's
23 claim, then the plaintiff has failed to sustain its burden
24 and you must return a verdict in favor of the defendant
25 on those issues.

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Now let's turn to the specific issues of fact which you must determine in this case. You may recall that in the opening statements you were told that there were two separate causes of action alleged by the plaintiff. One of those two causes of action has since been dismissed, so that you will have to reach a verdict as to only the remaining cause of action, which is a cause of action for alleged breach of contract. The contract at issue is an oral agreement between plaintiff M.J.B. and defendant Dana Hall. It is alleged to have been breached by the failure to pay commissions which were allegedly due to plaintiff on certain sales made by it on behalf of Dana Hall. There is no dispute as to the terms of the agreement. Both parties agree that during the period in question the defendant was obligated to pay commissions at the full commission rate of seven percent on shipments made by defendant on orders booked by plaintiff for customers in areas not served by another sales representative of defendant, and a so-called split commission rate of three and a half percent on shipments made on orders booked by plaintiff for customers in areas served by another sales representative of defendant.

The parties agree that the agreement was
terminated no later than May 1, 1972, so that no commissions

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1 were payable to plaintiff on shipments made on orders
2 booked after April 30, 1972. It is no longer disputed
3 that all commissions due to plaintiff on shipments made
4 prior to May 1, 1972, were paid in full, and that all
5 shipments made on orders booked by plaintiff had been
6 completed no later than the end of July, 1972, so that
7 defines the critical period that we are talking about.

8
9 It is also no longer disputed that for the
10 shipments made during the period of May 1st to May 25,
11 1972, plaintiff was due royalties in the amount of \$8,387.
12 The jury is, therefore, directed that it must return a
13 verdict in favor of the plaintiff in at least this
14 amount of \$8,387 less the amount of any previous payments
15 for which the jury shall find defendant is entitled to
16 credit, plus interest from June, 1972, when such commissions
17 should normally have been paid until the present time on
18 the net balance. Defendant admitted he sent three checks
19 for \$1,000 each respectively payable to plaintiff's
20 officer Orenstein, Kleeman and Katz as a credit against
21 the royalties due on shipments made during May of 1972.
22 The checks to Orenstein and Kleeman were returned to de-
23 fendant during the trial. Defendant claims that it was
24 not entitled to credit for the \$1,000 paid to Katz
25 until the time the check to Katz was mailed defendant

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2 was under the mistaken impression that M.J.B. was a partner-
3 ship of Orenstein, Kleeman, and Katz and not a corporation,
4 and that equal payments to the three partners was an
5 appropriate way of discharging the obligation to M.J.B.

6 Plaintiff, on the other hand, asserts that M.J.B.
7 received no benefit from the check to Katz, which was con-
8 verted to his personal benefit, and that defendant should
9 shoulder the loss of its mistake. The jury must, therefore,
10 determine, first, whether plaintiff had given defendant
11 reason to believe that M.J.B. was a partnership and
12 second, whether defendant acted in good faith and in
13 reasonable reliance on such belief. Unless both of those
14 conditions are satisfied, defendant would not be entitled
15 to credit for the thousand dollars paid to Katz.

16 The only commissions remaining in dispute
17 are, therefore, those payable on shipments made during the
18 period from May 25, 1972, to the end of July, 1972,
19 on orders booked by plaintiff before the end of April,
20 1972. I am going to repeat that. The only commissions
21 remaining in dispute are those payable on shipments made
22 during the period from May 25, 1972, to the end of July,
23 1972, on orders booked by plaintiff before the end of
24 April, 1972.

25 Unfortunately, there is no simple and certain

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2 way of determining the dollar volume of these shipments.
3 A large number of invoices for shipments made during the
4 period in question have been placed in evidence but there
5 is conflicting evidence as to which, if any, of these
6 shipments were made on orders booked by M.J.B. before the
7 end of April. Unfortunately, the orders themselves and
8 the order cards for the respective customers are not in
9 evidence. Thus, in determining whether the orders were
10 booked before the end of April, you will have to consider
11 such factors as the expected time lag between the date
12 an order is booked and the date it is shipped, the date
13 on which the customer's credit was approved, and any other
14 factors you find relevant. You may also, if you decide
15 it is reasonable to do so, draw an inference that any of
16 the records of the order dates which were available to
17 one party and which it did not produce in evidence, would
18 have established dates unfavorable to the contentions
19 of that party in the case unless, of course, you find
20 that the records were also known to and available to the
21 other party.

22 The Court allowed the plaintiff to introduce
23 into evidence adding machine tapes showing the respective
24 totals of the shipments during the latter part of May, June
25 and July, 1972, as reflected by the invoices in evidence.

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2 You should, of course, disregard these totals unless you
3 find that all of the shipments reflected by these invoices
4 were made on orders booked by M.J.B. before the end of
5 April, 1972.

6 After you have resolved the conflict in the
7 evidence, and determined the volume of shipments, if any,
8 which were subject to the full commission rate of seven
9 percent, and the volume, if any, subject to the split
10 commission rate of three and a half percent, to compute
11 the commissions due on such shipments you must first
12 deduct from the total amount of the shipments in each
13 category the eight percent trade discount plus any sales
14 returns which were made in that category during the
15 period in question, and multiply the resulting net
16 amounts by the applicable commission rates, either seven
17 percent or three and a half percent, to determine the
18 commissions due.

19 I better repeat that: to compute the commissions
20 due to the shipments which you find to have been made in
21 each category on which a commission is due, you must first
22 deduct from the total amount of the shipments in each
23 category the eight percent trade discount plus any sales
24 returns which were made in that category during the period
25 in question, and multiply the resulting net amounts by the

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2 applicable commission rates of either seven percent or
3 three and a half percent to determine the commissions due.

4 Finally, on any amount which you find to be due
5 to plaintiff, you should also allow interest from the due
6 date, which was about June 1, 1972, to the present date,
7 in other words, slightly less than two years.

8 I said in error that the due date was about
9 June 1, 1972. That would be only for the shipments made
10 during May. The shipments made during June would have a
11 due date for the commissions in the early part of July,
12 the first of July or shortly thereafter. Shipments made
13 during July would have a commission due date of the 1st
14 of August or shortly thereafter.

15 The rate of interest which you should use in
16 computing the interest due for that period of somewhat
17 less than two years should be the rate which you find
18 might reasonably have been earned on safe investments
19 during that period, for example, either six percent or
20 seven percent would surely be within the reasonable range.

21 In deciding the fact issues, you are called
22 upon to determine the credibility of the witnesses, some
23 of whom were contradicted by other witnesses, or perhaps
24 even by the documentary exhibits, and in some instances,
25 may even have contradicted themselves. In determining

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2 the credibility of each witness; you should consider his
3 demeanor before you, that is, how he behaved and conducted
4 himself on the stand, how he impressed you, whether he
5 was frank and forthright, or evasive, his personal stake
6 or interest in the case, that is, his motive to falsify,
7 and whether he was in a position to have personal knowledge
8 of the matters that were the subject of his testimony or
9 her testimony, as the case may be.

10 In short, in determining whether a witness' testi-
11 mony is credible or believable, what you do, to use a
12 colloquial expression, is to size him up or size her up
13 to determine whether he or she seems to be a reliable or
14 trustworthy witness. If you find that any witness
15 willfully testified falsely as to any material fact, you
16 may disregard the testimony of that witness in total, or
17 you may accept that part which commends itself to your
18 belief or which you find is consistent with other evidence
19 in the case.

20 You should not be concerned, and I am sure you
21 wouldn't be, with who the parties are, with the fact
22 that M.D.B. is a small company and that Dana Hall is a large
23 and has been a successful company.

24 Sympathy or prejudice should not enter at all
25 into your deliberations. Your oath is to render justice

1 fairly and impartially without fear or favor and to decide
2 the fact issues solely on the evidence in the case.
3 Each juror is entitled to his or her opinion but you are
4 required to exchange views with your fellow jurors.
5 That is the very purpose of your jury deliberation. You
6 should discuss the evidence with each other, your recollec-
7 tion of the evidence, and your viewpoints about the fact
8 issues. You should keep an open mind until the deliberation
9 is concluded. You should accept the ideas of others in
10 a sense of open-mindedness and willingness to change your
11 original position if you are convinced that the opposite
12 view is really one which satisfies your own judgment and
13 conscience. In other words, you are not required to give
14 up a point of view that you conscientiously believe in
15 simply because you are outnumbered. The purpose of your
16 deliberation is to reach a single verdict for the entire
17 jury if that can be done. Any jury verdict must be
18 unanimous, that is, all of the jurors must be able to
19 accept it as his or her own.
20

21 Mr. Heina, who is the first juror chosen, will
22 be the foreman of the jury unless you decide that you want
23 to select someone else.

24 If you have forgotten what the testimony was
25 on a particular point and want to hear any of the testimony

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2 over again, Mr. Heina can send out a note through the
3 U. S. Marshal who will be at the door to me, and we will
4 have the court reporter read back the applicable part of
5 the testimony. If you have any questions concerning the
6 charge, or want anything clarified, Mr. Heina can also
7 send out a note to me and I will be glad to either repeat
8 or to clarify any part of the charge that you don't recall
9 or understand.

10 I will see counsel at the side bar.

11 (At the side bar.)

12 THE COURT: Do you have any exceptions or
13 suggestions with respect to the charge?

14 MR. STRASSBERG: In the pretrial order,
15 reference was made that there was due to the plaintiff --

16 THE COURT: All right. That should be added
17 to the \$8,387. All right. That is \$528.

18 MR. TESSLER: Your Honor stated and it was
19 not disputed that there were no commissions payable on
20 orders looked after April 30, 1972, but I would appreciate
21 it if your Honor would deem it proper to refer to the jury
22 the issue as to when the contract was terminated, whether
23 it was terminated sometime earlier in April in view of the
24 evidence introduced of sales made by the plaintiff's indi-
25 viduals and shipments made in May to support the defendant's

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contention that the contract was terminated much earlier.

THE COURT: All right.

MR. STRASSBERG: I don't think that is --

THE COURT: Well, I can leave that. I will just simply say that the defendant contends that the contract was actually terminated before the end of April.

MR. STRASSBERG: Your Honor also made a reference to a unanimous verdict. Isn't it a five-sixths verdict?

THE COURT: If you stipulate five-sixths, that is all right. Is that agreeable to both of you?

MR. TESSLER: No, it is not.

THE COURT: All right.

MR. STRASSBERG: I will take exception to that simply because I believe that it is a matter of law only five-sixths is required.

THE COURT: Not unless counsel stipulate.

MR. STRASSBERG: All right.

(In open court)

THE COURT: I want to supplement my charge in the respects. Number one, it was stipulated by counsel in the pretrial order that an additional amount of \$528 is owed by defendant to plaintiff as a credit on the sample account, so that when I told you you must return a verdict for \$8,587 in favor of the plaintiff against the defendant,

I am going to ask you to forget that amount and substitute the total of \$8,387 plus \$528, which is \$8,915, which is the amount which defendant has conceded that it owes to the plaintiff, and which, of course, must be increased by interest at the rate you find reasonable for the period of approximately 1st of June to date, a little less than two years.

Of course, that will be supplemented further by any amount which you find the plaintiff is entitled to for additional commissions payable on shipments made during the period from May 25th to the end of July, 1972, on orders booked by M.J.B. before the end of April. The reason I emphasize by "M.J.B." is that the defendant contends that the contractual relationship between M.J.B. and Dana Hall actually ended somewhat before the end of April when Mr. Katz became an individual employee of the defendant Dana Hall at its New York showroom at 1400 Broadway, and the defendant contends that any orders written by Mr. Katz during the last two weeks in April should have been credited to Katz personally and not to M.J.B., and that Mr. Katz, in fact, paid such commissions.

You will have to decide whether the evidence sustains that contention, in other words, you will have to decide whether for the last two weeks of April the

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orders written were written for the account of M.J.B. or for the account of Katz personally, that is, whether the commissions should have been credited to Katz personally or to M.J.B. during that two-week period at the end of April.

That concludes the charge, and it brings us to the point where we can excuse our alternate juror, Mr. Trotts.

I am sure you are just as happy not to have the additional burden of participating in the deliberations. We appreciate your sitting with us and giving us your attention through the trial. You understand that you served a very useful function in case any of the other jurors became ill or had to be excused for any other reason or had to fill out the jury. Thank you very much, Mr. Trotts.

(Two U. S. Marshals were duly sworn)

(The jury retired to deliberate at 10:20 A.M.)

THE COURT: I want to thank counsel for a very able presentation on both sides.

MR. STRASSBERG: Thank you, your Honor. Thank you for the manner in which you conducted the proceedings.

(Recess)

(5:35 P.M. - jury present)

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2 THE CLERK: Members of the jury, please answer
3 present as your name is called.

4 (Jurors' names are called and each answers
5 present.)

6 THE CLERK: Mr. Foreman, has the jury agreed
7 upon a verdict?

8 THE FOREMAN: Yes, we have.

9 THE CLERK: How do you find?

10 THE COURT: Hand it to him. He probably wants
11 to look at it to refresh his recollection.

12 THE FOREMAN: We find the plaintiff is awarded
13 by the court \$8,915 less \$1,000 to Mr. Katz, totaling
14 \$7,915.

15 Additional commissions, \$15,817.21 for a total
16 of \$23,732.21. Commissions prorated at six percent
17 interest per year since 6/1/72.

18 THE COURT: Your commission figure includes
19 the six percent?

20 THE FOREMAN: No, it does not.

21 THE COURT: It is to be supplemented by adding
22 six percent interest since June 1, 1972?

23 THE FOREMAN: Yes, your Honor.

24 THE CLERK: Members of the jury, please listen
25 to your verdict as it now stands recorded: you say you

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find for the plaintiff in the total of \$23,732.21 plus interest and so say you all.

THE COURT: I want to thank each and every one of you. You have had an unusually tough case. You had to do much more than the jury customarily has to do in that you had to take some raw data and do a lot of accounting work in order to come up with a figure, and I am sure you worked very hard and conscientiously.

I thank you very much for the time. It is quite an imposition that the state makes upon you to ask you to give up your regular activities and come into court, but if it weren't for people like you to do these things our system of justice couldn't work. One of these days you may be a plaintiff or defendant in a case and some other citizen will be giving up his time in your behalf, and I thank you very, very much for your time and attention. You are excused.

(Jury excused)

THE COURT: Anything further?

MR. STRASSBERG: Nothing, your Honor, except I'd again like to thank your Honor for the manner in which this trial has been conducted.

MR. TESSLER: At this time, your Honor, on behalf of the defendant I would ask the Court to enter judgment

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for the defendant notwithstanding the verdict on the grounds that the credible evidence presented to the jury does not support a verdict in favor of the plaintiff above the sum of \$8,915.

THE COURT: Your motion is denied.

MR. TESSLER: Your Honor, at this time the defendant asks that the verdict of the jury be set aside, that a new trial be granted, for all the reasons set forth in the Federal rules.

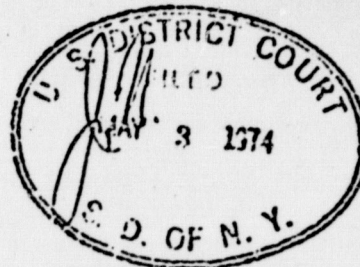
THE COURT: Denied.

MR. TESSLER: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



M J B SALES ASSOCIATES

Plaintiff

-against-

DANA HALL OF CALIFORNIA, INC.

Defendant

JUDGMENT

#74,397

72 Civil 2850 (WCC)

The above entitled action having come on regularly for trial before the Honorable William C. Conner, United States District Judge, and a jury, on April 22, 23, 24 and 25, 1974, and the jury having returned a verdict in favor of the plaintiff, it is,

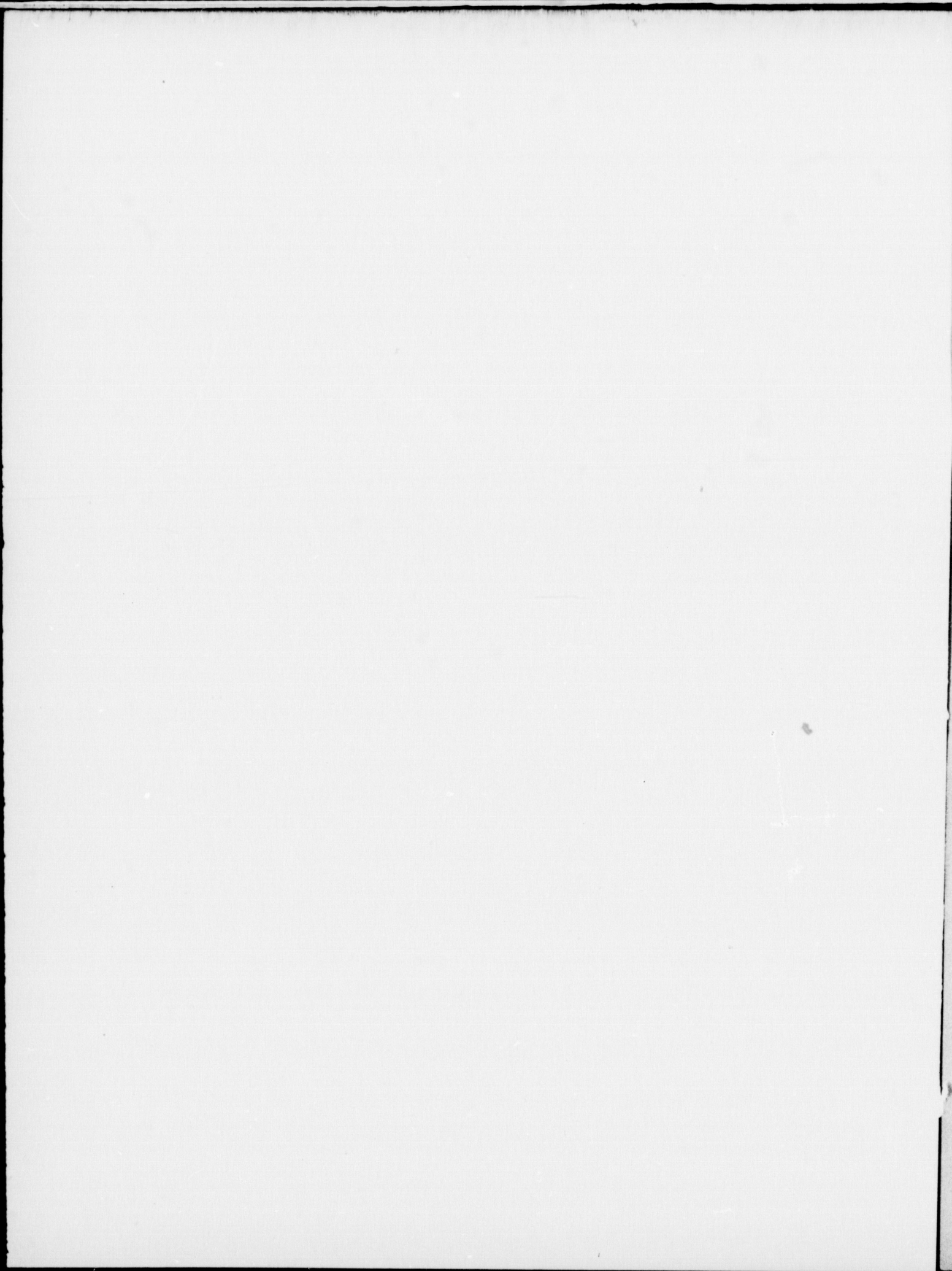
ORDERED, ADJUDGED and DECREED: That the plaintiff M J B SALES ASSOCIATES have judgment against defendant DANA HALL OF CALIFORNIA, INC., in the amount of \$23,732.21., together with interest at the rate of 6% from June 1, 1972.

Dated: New York, N.Y.
May 3, 1974

Raymond F. Berghardt
Clerk

23,732.21
7382.

245 21



Received by
Harry & Harry
Oct 4, 1974 - 4²⁵ p.m.
Two (2) copies
Meth. Harry
for Harry & Harry